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IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1975

No. 75-1532

JOHN HECHINGER, *et al.*, *Appellants*,

v.

DR. ROBERT MARTIN, CHAIRMAN, DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, *et al.*, *Appellees*.

On Appeal from the United States District Court for the District of Columbia

JURISDICTIONAL STATEMENT

Joseph H. Sharlitt

BECHHOEFER, SNAPP, SHARLITT & LYMAN
Suite 300
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Counsel for Appellants

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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JURISDICTIONAL STATEMENT

INTRODUCTION

This Court, the Congress and state legislatures have traditionally refrained from meddling with the purely political process by which elected representatives are chosen in this country, except to insure the basic freedom of choice and substantial equality of voters. By enacting the statute which is in controversy in this case, Congress has embarked on an historic new venture. It has, for the first time in history, dictated in advance and by its own fiat the political makeup of a significant portion of an ostensibly elected body, the

District of Columbia Council, thereby denying the right of citizens within the District to express their political consciences and to elect their own representatives for this segment of their local legislature. This same statute, if unchecked by this Court, constitutes an open license for any state legislature in the land to fix in advance the representation of each political party in ostensibly elected local legislative bodies (such as City Councils and County Commissions), thus invading by legislative decree a domain in our polity that has been preserved to each voter's conscience.

In addition, for the first time, this Court is asked to review an Act of Congress which discriminates against all voters holding partisan political beliefs, denying them seats in a local legislature, while freeing those who do *not* hold partisan political belief (Independents) from any such loss of representation.[1]

By this enactment Congress has ventured full tilt into dictating who may and who may not represent voters in the voters' own legislature; disqualifications dictated in advance and based solely on the political belief of certain candidates.

This Appeal seeks review of this constitutional Pandora's box, which in its obvious significance, has no limits.

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[1] The states, too, qualify voters by residence and age. The point of this Court's recent apportionment decisions is that this must be even-handed and non-discriminatory.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the United States District Court for the District of Columbia (sitting as a three-judge court) entered on March 24, 1976, denying Appellants' Motion for Preliminary and Permanent Injunction against enforcement by the Defendant Board (appellee in this Court) of Sections 401(b)(2) and 401(d)(3) of the District of Columbia Self-Government and Governmental Reorganization Act (known popularly and referred to hereinafter as the "D.C. Home Rule Act":) and granting Summary Judgment to Appellees. This is an Appeal brought to this Court under Section 1253 of Title 28 (U.S.C.) from the determination of a three-judge court convened to adjudicate the constitutionality of the cited provisions of the District Home Rule Act. Pursuant to statute, this cause is before the Supreme Court on its merits.

OPINION BELOW

The opinion of the three-judge court is not reported. Copies of the opinion are attached to this Statement as Appendix A.

JURISDICTION

This suit was brought under Sections 2201, 2202, 2282 and 2284 of Title 28 (U.S.C.). It seeks declaratory judgment declaring the voter-restriction provisions (cited hereinabove) of the District of Columbia Home Rule Act unconstitutional, and preliminary and permanent injunctions against their enforcement by the Defendant Board, appellee herein. On February 20, 1975, the cause was certified by U.S. District Judge William Bryant to the Chief Judge of the Circuit (pursuant to Section 2284 of Title 28, U.S.C.) and the Chief Judge, as required by the statute, convened

a three-judge panel on February 24, 1975. The cause was then briefed before this panel, argued and submitted on October 8, 1975. On March 24, 1976 the three-judge panel entered its decision, which is attached as Appendix A. The appeal to this Court is taken, as noted, pursuant to Section 1253 of Title 28 (U.S.C.).
Notice of Appeal filed in the U.S. District Court on April 23, 1976

QUESTIONS PRESENTED

(1) Do Sections 401(b)(2) and 401(d)(3) of the D.C. Home Rule Act infringe on rights of the appellants to vote their political beliefs for their elected representatives, as these rights are guaranteed by the First Amendment?

(2) Do the same sections deny to these appellants equal protection of the laws in that the restrictions (against electing representatives of their political choice) found in these sections apply only to voters who profess partisan political belief (such as appellants), and do not apply to voters who do not profess partisan political belief, viz., independants: does such denial, accordingly, violate appellants' rights under the Fifth Amendment.

(3) Do the same sections deny to these appellants equal protection of the laws by apportioning to them representation in their legislature far lesser than their numbers, violating this Court's one-man, one-vote principle.

STATUTES INVOLVED

Sections 401(b)(2) and 401 (d)(3) of the District of Columbia Home Rule Act are set forth, *infra*, p. 5-6.

STATEMENT OF FACTS

A. The Statute

Under the District of Columbia Self-Government and Governmental Reorganization Act ("the Act")[2] the 93rd Congress created an elective Council of the District of Columbia. The Council is made up of 13 members, one of whom (separately elected at large) is the Chairman. Of the remaining 12, eight are elected from wards in the District. Four are elected at large. The Council will possess the "legislative power granted to the District . . ."[3] and this power includes the power of setting the fiscal budget for the District as well as other major legislative functions.

The following restriction was placed by Section 401(b)(2) of the Act on the election of at large members of the Council:

> "In the case of the first election held for the office of member of the Council after the effective date of this title, not more than two of the at large members (excluding the Chairman) shall be nominated by the same political party. Thereafter, a political party may nominate a number of candidates for the office of at large member of the Council equal to one less than the total

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[2] Public Law 93-198 (87 Stat. 744), signed into law by the President on December 24, 1973; approved by a majority of the voters of the District of Columbia by Referendum on May 7, 1974. This referendum was of the entire D.C. Home Rule Act as a package. No item veto was allowed. It was Home Rule under this Act or no home rule at all.

[3] Section 414(a).

number of at large members (excluding the Chairman) to be elected in such election." (Emphasis supplied.[4]).

The following further restriction was placed by Section 401(d)(3) of the Act on at large members of the Council:

> "Notwithstanding any other provisions of this section, at no time shall there be more than three members (including the Chairman) serving at large on the Council who are affiliated with the same political party."

B: Registration

Under the election laws of the District of Columbia the Defendant Board is authorized and directed to maintain a registry of qualified voters within the District of Columbia. Such registration includes the party affiliation of each qualified voter or the fact that the registered voter is not affiliated with a party. As of the date of this Jurisdictional Statement the following are the most recent totals[5] of qualified voters within the District of Columbia affiliated with each political party or unaffiliated with any party:

(a) Democratic Party 208,566 (or 76.55% of the qualified voters)

[4] The sentence of the provision under scrutiny in this suit, together with 401(d)(3), quoted immediately thereafter.

[5] Appellee Board's most recent figures, which are for March of 1975.

(b) Republican Party 31,392 (or 11.52% of the qualified voters)

(c) Statehood Party 1,515 (or .55% of the qualified voters)

(d) Other Parties 690 (or .25% of the qualified voters)

(e) Independent or unaffiliated qualified voters 30,288 (or 11.11% of the qualified voters)

C: The Primary of Election of September 10, 1974

Under Section 751 of the Act, each of the three Parties within the District of Columbia qualified (Under Section 751(e) of the Act) to hold a primary election did so on September 10, 1974. The Parties qualified by past polling records, are the Democratic, Republican and Statehood Parties. In this primary election, the following individuals received the following votes:

(a) Democratic Party primary:

Marion Barry	35,065
Rev. Douglas Moore	25,598
Delano Lewis	22,122
Ruth Hankins-Nesbitt	20,836

(Others received smaller numbers not herein relevant.)

(b) Republican Party primary:

Rev. Jerry Moore	4,481
Rockwell Foster	4,066
Melvin Burton	3,653

(c) Statehood Party: Since there were only two candidates on the Statehood Ballot, both were certified by the Board as having been elected candidates.

Pursuant to the provisions of Section 401(b)(2) the Defendant Board certified as successful candidates the following individuals from the above list, thereby placing them on the ballot for the General Election to be held on November 5, 1974:

Democrats:	Marion Barry Rev. Douglas Moore
Republicans:	Rev. Jerry Moore Rockwell Foster
Statehood:	Julius Hobson, Sr. Josephine Butler

D: General Election of November 5, 1974[6]

On November 5, 1974 the General Election was held in the District of Columbia. In it the following were elected with the following votes (as certified by the Certificates of Election filed by the Defendant Board):

Douglas E. Moore	55,928 votes
Marion Barry	55,615 votes
Julius W. Hobson	48,708 votes
Jerry A. Moore, Jr.	35,297 votes

[6] Two of the present appellants brought this same action just prior to the 1974 election but were held to be, by a separate three-judge panel, too late for the Court to do anything about that election. That Court specifically stated that its determination was without prejudice to a future suit. The present suit was then filed after the 1974 election.

Prior to being seated as Councilmen at large, the four individuals who were elected drew lots to determine who would hold two-year terms, and who would hold four-year terms. Marion Barry and Jerry Moore, Jr., drew the two-year terms, which will terminate in the next general election in the District, to be held in November of 1976. Douglas Moore and Julius Hobson drew four-year terms, which will terminate in the general election in the District to be held in November of 1978.

E: The Statute and the November 1976 Election

This suit was filed on November 15, 1974. By Stipulation, and with the approval of the Court, briefing was completed in September, 1975 so that a final determination of the controversy could be secured well in advance of the November, 1976 election. The cause was argued before the three-judge panel on October 8, 1975. It rendered its decision on March 24, 1976.

Accordingly, unless changed by Order of this Court, in the general election of November 1976 the Democratic, Republican and Statehood Parties will, pursuant to Section 401 (b)(2) of the Act, each be permitted to nominate but one candidate for the two at large seats to be filled. In that same election, however, both seats may be filled by Independents. It is that provision, and the continuing operation of Section 401(d)(3) that this lawsuit seeks to test.

F: Proceedings below:

Appellants, Plaintiffs below, make three contentions in this suit. First, that as registered Democrats they have been denied voting and associational rights protected under the First Amendment when they were denied (by the contested statutory provisions) the right to vote for 50% of the

at large councilmen in the District of Columbia Council.[7] Second, that as members of a political party they were improperly discriminated against by these same provisions, which exempted independents from their restrictions, permitting independents to fill all four Council seats whereas members of a political party are permitted to fill only two. Third, as registered Democrats making up 76.55% of the registered voters of the District of Columbia, these appellants were similarly denied equal protection by being restricted to access to but 50% of the Council's at large seats on the ballot. The latter two contentions were made under the Fifth Amendment.

The Court below, after its consideration of the cause from October 8, 1975 to March 24, 1976, granted Defendants' and Intervenors' Motions for Summary Judgment, denying Plaintiffs (appellants herein) prayers for relief. The Court held that the First Amendment interferences argued by the Plaintiffs were justified by "Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capital", and that the means chosen by Congress were reasonable. The panel held that past cases supported this view, primarily *Blaikie v. Power*, 13 N.Y. Ed. 134, 193 N.E.2d 55 (1963), appeal dismissed at 375 U.S. 439 (1964); *Buckley, et al. v. Valeo, Secretary of U.S. Senate, et al.*, 44 LW 4127 (January 30,

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[7] Section 401(b)(3) limited each party to no more than 2 of the four at large seats on the first Council and limits each party to no more than one of the 2 seats to be filled in the 1976 election. Section 401(d)(3) includes the Chairman also selected at large, limiting each party to no more than three representatives elected at large, including the Chairman. Thus Democrats have been denied access to 50% of the at large seats in the Council by 401(b)(2) – two seats of four – and 40% of the total. Neither of these restrictions apply to Independents, who can fill all 5 at large seats, including the two to be filled in the 1976 election.

1976) and *Gaffney v. Cummings*, 412 U.S. 735 (1973). The panel further held that "no discrimination of Fifth Amendment problem is apparent" in the voting scheme made up of the contested statutes.

G: Opinion below: The Opinion below is attached to this Jurisdictional Statement as Appendix A.

THE QUESTIONS ARE SUBSTANTIAL

(A): The rights of appellants are protected by the First and Fifth Amendments and have been for over 100 years.

Among those freedoms preserved traditionally by this Court from state-imposed inhibitions is the free and unfettered exercise of the individual franchise. Beginning with Civil Rights legislation passed at the close of the Civil War, extending through this Court's successful clearing of the vast snarl of state-imposed apportionment inequities in the 1960's and 1970's, and extending to this Court's most recent decisions, freedom from state interference with the individual's free exercise of his political rights in elections has been accorded as high a place as any protected right of American citizenship. This First Amendment protection has been matched by the Court's concern for the substantial equality of each voter's exercise of his political preferences; this protection has been accorded under the Fifth Amendment.

The legislation tested in this case flies straight into the face of both policies of this Court, and does so with no warrant from any of this Court's past decisions or opinions.

There is no need to delineate the last century's constitutional developments in defense of the unfettered right to vote. Nor is there any need to repeat this century's reassurance of this right in the Voting Rights Act of 1965. These are guarantees of the right to express First Amendment preferences, not in some elections, for some offices, with other elections and elective offices excluded from the guaranty. These are landmark guarantees of the right to vote in *all* elections in which elective offices are being filled.

More recently this Court has reiterated the same guarantees. In 1968 this Court stated in Williams v. Rhodes, when the American Independent Party and Socialist Worker candidates were denied access to the Ohio ballot:

> "393 U.S. 23, at 30: "in the present situation the state law places burdens on two different, although overlapping, kinds of rights – the right of individuals to associate for the advancement of political beliefs, and the right of qualified voters, regardless of their political persuasion to cast their votes effectively. Both of these rights, of course, rank among our most precious freedoms. We have repeatedly held that freedom of association is protected by the First Amendment, . . . Similarly we have said with reference to the right to vote: "No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

This same concern that the right of political expression remain impervious to interference was voiced again just 15 months ago in *Cousins v. Wigoda,* 419 U.S. 477 (1975). Illinois state law was there held by its highest court to supervene in the election of national convention delegates. But this Court held that party activity embraced under its constitutional protection the right to fix convention seating rules. The nature of constitutional protection of political activity was defined:

> 479 U.S. at 603: "There can no longer by any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of "orderly group activity" protected by the First and 14th Amendments . . . the right to associate with the political party of one's choice is an integral part of this basic constitutional freedom."

As shall be demonstrated below, no decision of this Court has ever sanctioned a direct violation of this freedom in the form of a state prohibition against voting for a party's candidates for designated legislative offices.

(B): Whatever limitations there are on First Amendmends rights (if such limitations exist) do not justify a denial of the right of each voter to express his political preference for his representative in his legislature.

(1) *No presumption of constitutional rectitude is accorded state interference with voting rights:* It is the thrust of this Jurisdictional Statement that Congress has pitched

every state legislature and all of our Courts into the business of manipulating voting rights, an activity improper for both. In *Hechinger*, half[8] of the at large seats in the legislature created by Congress for the District of Columbia are excluded by statute from the free participation of the District electors. This kind of statute is entitled to no presumption of constitutionality. This Court, in *Kramer v. Union School District* spoke directly to this point:

> 395 U.S. at 627: "And, for these reasons, the deference usually to the judgment of legislators does not extend to decisions concerning which resident citizens may participate in the election of legislators and other public officials. Those decisions must be carefully scrutinized by the Court to determine whether each resident citizen has, as far as is possible, an equal voice in the selections. Accordingly, when we are reviewing statutes which deny some residents the right to vote, the general presumption of constitutionality afforded state statutes and the traditional approval given state classifications if the Court can conceive of a "rational basis" for the distinctions made are not applicable."

Where First Amendment restrictions to an entire class of voters are present (as they are to all Democrats within the District of Columbia under this statute), the presumption goes the other way:

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[8] In the 1976 election and under Section 401(b)(2); as shown *supra*, the exclusion under Section 401(d)(3) covers 2 of the 5 representatives elected at large, or 40%.

> "But as a general matter, before the right (to vote) can be restricted the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The Court below has chosen to assert in this case that:

> "Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capital is a valid one, sufficiently important to warrant the challenged interference with the rights of political association." (Slip opinion, p. 5)

But it is clear that the mere *recital* by Congress of its interest meets no constitutional test in this highly sensitive area of political freedom:

> "As our past decisions have made clear, a significant encroachment upon associational freedom cannot be justified upon a mere showing of a legitimate state interest. . . . For even when pursuing a legitimate interest, a State may not choose means that unnecessarily restrict constitutionally protected liberty." *Kusper v. Pontikes*, 414 U.S. 51, 56.

That test, imposed by this Court in *Kusper*, has never been applied to this statute. It is a test that neither this statute nor the unhappy spawn of legislative experiments that it will inevitably sire, can ever pass. For each time a legislature dictates the makeup of a subordinate elective body it is necessarily and impermissibly denying the right of electors to vote freely for that elective body.

(2) *This Court has never approved voter-restriction statutes:* On but two occasions have statutes such as this one ever been before this Court. The first was *Blaikie v. Power,* 13 N.Y. Ed. 134, 193 N.E.2d 55 (1963), appeal dismissed at 375 U.S. 439 (1964). Here the City of New York attempted to replace its proportional representation statute with another ordinance aimed at insuring minority representation in the New York City Council. Examination of Judge Fuld's opinion in the New York Court of Appeals makes it quite clear that neither the First Amendment questions posed in *Hechinger* nor the Fifth Amendment inequity (in freeing independents from the voter-restriction found herein) were at issue before Judge Fuld or ruled on by him. The briefs on appeal to this Court are similarly devoid of any reference to either issue. The major issue before the Court of Appeals was that of violation of a special provision of the *New York* Constitution, a notion rejected by Judge Fuld in terms that simply do not apply herein.

In *LoFrisco v. Schaffer,* 341 F. Supp. 743 (D.C. Conn. 1972), aff'd, 409 U.S. 972, the trial court had before it a Connecticut voter-restriction statute. Again, the thrust of the argument before the three-judge Court and in briefs to this Court on appeal was that statute's violation of the one-man, one-vote apportionment principle. That is not the first, nor the second, but the third of the major arguments in *Hechinger.* The first two (First Amendment violations, and the unequal treatment accorded party voters under the Congressional statute) were not argued in *LoFrisco* nor ruled on below, nor argued in this Court.

It is appellants' position that the contested provisions of the D.C. Home Rule Act are a historic constitutional departure from existing First Amendment guarantees of voting rights, a departure than cannot be supported by what occurred in Courts below or before this Court in

either *Blaikie* or *LoFrisco.* If this Court wishes to issue a license to future legislative meddling with voting rights, it will be this Court's license, based on what is decided in *Hechinger.* On the basis of the clear written record, there simply is no way that this responsibility can be shared with the *LoFrisco* or *Blaikie* Courts below, or by this Court in its review of those Courts.

(3) *The remaining cases cited by the Court below are not precedent for what this Statute will do.* None of the remaining cases cited by the Court below supports this statute's departure from First Amendment guarantees previously recognized by this Court. *Buckley v. Valeo, Secretary of the Senate,* 44 LW 4127 (January 30, 1976), is quoted extensively below. It is a far cry from Congressional limitations on campaign expenditures, the subject of *Buckley,* to a flat prohibition against Democrats holding legislative office, the problem in *Hechinger.* Neither *Kaelin v. Warden,* 334 F. Supp. 602 (1971) and *People v. Carpentier,* 30 Ill. 2d 590, 198 N.E.2d 517 (1964) cited by the Court below[9a] came to this Court; *Carpentier* never got to a federal court. The language of *Gaffney v. Cummings,* 412 U.S. 735 (1973), cited by the Court below (slip opinion, p. 9-10), an apportionment case, provides its own distinction to *Hechinger.*

> "As we have indicated, for example, multi-member districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized" *Gaffney,* 412 U.S. at 754.

[9a] Slip opinion p. 6-7.

In *Hechinger*, the Democrats of the District of Columbia have been totally fenced out of the political process of electing half[10] of the at large Councilmen in the District of Columbia, a multi-member jurisdiction, and fenced out *as a matter of law*. In *Hechinger*, the Democrats of the District of Columbia have had their voting strength for these same elective posts cut from 76.55% to 50% *as a matter of law*.[11] That is the precise opposite of attempting to apportion Connecticut

> "to allocate political power to the parties in accordance with their voting strength and within quite tolerable limits," succeed[ing] in doing so" (*Gaffney*, at 754)

as this Court approved in *Gaffney*.

What this Court is asked to sanction has never been subject to the full briefing and intensive questioning justified by a new and dangerous legislative adventure. Full briefing of the constitutional issues and oral argument are certainly in order before this Court takes its leap into this new political thicket.

(4) *What this statute proposes is both impermissible and limitless in terms of legislative interference with guaranteed constitutional freedoms.*

(a) This incursion into legislative manipulation of voting rights is justified by the Court below in the following terms:

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10 Under Section 401(b)(2) and in the 1976 election; the denied access is to 40% of representatives elected at large under Section 401(d)(3).

11 *Ibid.*

> "We believe that Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capital is a valid one, sufficiently important to warrant the challenged interference with the rights of political association." (slip opinion, p. 5)

This assertion deals with a statutory prohibition imposed on District Democrats against their voting their political preference for half of the District Council's at large seats. Accordingly, this prohibition is favored with no presumptive constitutionality; and, as such, it must be tested narrowly. *Kramer v. Union School District, Kusper v. Pontikes, Dunn v. Blumstein, supra*, p. 10-11.

(b) The impropriety of this incursion by Congress is first evidenced by the absence of any rational limit to experimentation of this kind. Is Congress now free to legislate a *racial* balance in this same Council? If Congress can legitimately insure Republican membership in the District's legislature, can it insure white membership now, or black membership at some future date, or hispanic membership now or in the future? Is a *political* mix the only mix that is constitutionally blessed? What other balances are "sufficiently important"[12] to the legislative process? Is an *ethnic* balance in a City Council a proper subject for a legislature (*e.g.*, that of Illinois) to insure (*e.g.*, in the Chicago City Council).

It saves nothing for this Court to declare in *Hechinger* that insuring a political balance is constitutional, whereas a racial or ethnic balance must await adjudication, if and when it is proposed. What this Court is confronting in

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12 Opinion below, p. 5.

this case is legislative dictation to voters. It is the testing process of this constitutional novelty, as proposed below, *in this case* that is so troubling. Again, if the Illinois legislature were to legislate a 51% limit on Democratic membership in the Chicago City Council, is this to be tested solely by its *reasonableness*? Surely not, for if this is the test, then the Courts are catapulted full tilt into defining what is a reasonably minority and what is a reasonable majority in a local governing body. The Courts will be forced to decide the nuances of what is reasonable representation as a matter of law for a minority that cannot earn this representation at the polls. And among the unanswered questions posed by this test is whether but one party can invoke this reasonableness test, or can *all* minority parties, and if so, with what limit?

(c) If minority representation in local political affairs is the aim of this statute, is this nose of the Camel intruding in the right tent? For real minority give-and-take in our society is found not only between our parties, but within them. Certainly any political scientist observing the Washington scene in 1976 would be forced to observe that the array of views within the majority party is a major marketplace of ideas, and it is here that the experiment in legislating political vitality should be attempted. If the ruling below stands, the "reasonableness" test will lead to intro-party deliberations. Judicial intervention there is even less desirable.

(d) An essential element of the spectre before this Court is the unlimited opportunity for political manipulation and mischief that voter-restriction laws provide. If the political majority in a state legislature can legislate at will the makeup of county boards and city councils, the amount of political advantage open to that majority is immense. That political advantage is in no way lessened if it

is brought into being under a "minority representation" label. The federal courts, and ultimately this court, must then determine how much of the voter-restriction is pure aggrandizement at the town and country level for that majority party, and how much is legitimately based on minority representation.

In short each legislature (and thereby every federal court in review) will be required to offer its opinion as to what constitutes proper over-all representation for local voters, regardless of what those local voters, themselves, desire. This is an extension of legislative prerogative beyond permissible limits. Certainly this is no place for the Courts.

(e) What the Court below is proposing constitutes an open invtation for state legislatures to utilize voter-restriction laws to achieve results specifically prohibited by this Court's apportionment decisions. If Congress can disenfranchise 27% of the District's Democrats[13] in the District's at large races, this result can be repeated promiscuously by state legislatures seeking evasions of constitutional apportionment. All that is required is legislative action declaring that a certain number – or all – of county or town elective races must be run at large, and the imposition of a voter-restriction statute that prevents free choice by 15, 20 or 25% – or more – of the majority party in these elections. Reasonably equal apportionment is thus defeated under the guise of insuring minority representation. Under the lower Court's opinion the federal courts would inevitably be drawn into a series of confrontations, rendering decisions purely political in nature, an exercise far beyond this Court's proper province.

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[13] In the 1976 election and under Section 401(b)(2); the deprivation is 17% under Section 401(d)(3).

(f) This Court recently indicated most tellingly just where it believes virtue cannot practically or constitutionally be legislated in *Miami Herald v. Tornillo*, 418 U.S. 241 (1974). There this Court struck down Florida's statute guaranteeing a political candidate equal newspaper space in which to reply to political attack. The violation there was also of the First Amendment. The Court noted:

> (at 257) "A responsible press is an undoubtedly desirable goal, but press responsibility is not mandated by the Constitution and like other virtues it cannot be legislated."

These words apply equally to minority representation in local legislatures. If telling a newspaper what it must print violates the First Amendment, telling a Democratic voter he cannot vote for a Democrat to represent him in his local legislature is a violation no less egregious, capable of even greater constitutional mischief than that rejected by the Court in *Miami Herald*.

(g) Permitting a legislature to deny voters their franchise if it can justify the denial on general policy grounds is Russian roulette played with a basic constitutional freedom. The voters cannot win. An inevitable victim will be this Court and its business.[14]

Insuring active minority participation in local legislatures is a matter that has been turned over to the political arena in our country for 200 years. There, in the competition of ideas and at the ballot box, is where it belongs. It cannot be legislated.

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[14] That this policy is achieved by unreasonable means is discussed, *infra*, Section (c)(3), p. 20.

(C): The Fifth Amendment problems are unanswered by the Court below.

Appellants have urged that equal protection is denied them in two ways by the statute tested herein. First, it imposes a restriction against their selecting their preferred candidates for at large seats while imposing no similar restriction against independent voters. Second, because in allocating at large seats to Democrats, Congress, in its wisdom, has decreed that 50% shall be given the Democrats in contrast to the 76.55% of the electorate that is made up of Democrats.

(1) The opinion below makes it perfectly plain that in the view of that Court it is entirely constitutional to permit candidates of political parties to occupy only 50% of the at large seats on the D.C. Council whereas independent candidates may occupy all of them:

> "an independent candidate is exempted from the law's restrictions precisely because that person is *not* supported by an organization which is also supporting other candidates." (slip opinion, p. 11).

This distinction as to who may represent voters in the District of Columbia eludes precedent, any rationale yet articulated by Congress, and common sense. If Congress wished to encourage independent candidacy in the District there are a thousand constitutional ways to do so. Limitation on party expenditures is one. Requiring party candidates to endure the effort and expense of a primary, and permitting independents to go directly by petition to the final ballot is another: a restriction that is in present law, aggravating in practice the constitutional inequity. What Congress has ordained here is that independents in the District of Columbia are entitled to twice the representation

given to Republicans, Democrats or Statehood Party supporters; That rule is fixed and is without reference to what happens in any or all of the ward races.

It is unprecedented to grant one party, as a matter of law, twice the representation of another in an elected body. It is unprecedented to grant one form of political belief double the legislative power of another in advance and as a matter of law. This void is just as empty when the beneficiary of this preferential treatment is independent belief, which, of course, is just as surely political as is partisan belief.[15]

The reason that this is nowhere found – except in the District of Columbia under this enactment – is that it is grossly discriminatory and unrelated to any form of legitimate encouragement or subsidy which independent political thinking can possibly claim. It is gross paternalism; the whim of legislators in 1974 as to who should more beneficially represent the people.

(2) The Court below had no answer for, nor did it treat, the contention made by appellants that Democrats within the District of Columbia are denied equal protection of the law in an apportionment sense because Congress

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15 Not alone unprecedented but proscribed: "Further" (for invalidity of a multi-member apportionment scheme)" there must be more evidence than a simple disproportionality between the voting potential and the legislative seats won by a racial or political group. There must be evidence that the group has been denied access to the political process equal to the access of other groups." *Chapman v. Meier*, 420 U.S. 1, 17, citing White v. Regester, 412 U.S. at 765, 766. It is simply unreasonable to discriminate against Democrats, Republicans and Statehood Party supporters because of their beliefs.

has allocated to them no more than 50% representation[16] in the at large seats on the D.C. Council, in contrast to the 76.55% that Democrats comprise of the registered voters in the District. This apportionment is, as noted earlier, wholly without regard to what occurs in the eight ward races for the Council.

(3) The "reasonableness" of this restriction arises in another context as a result of the lower court's opinion. After determining that Congress' insuring minority representation in the D.C. Council justified the first amendment restrictions caused thereby, the Court held that the:

> "means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgment of those" (First Amendment "rights.") (slip opinion, p. 5).

Those "means", examined closely, are the inflation of minority voting strength in the District from 23.45% of those registered to vote, to 50% of the at large seats in the Council which must, as a matter of law, be filled by that 23.45% of the electorate. The reciprocal of this is the restriction of 76.55% of the electorate to but 50% of the at large seats on the Council. This artificial inflation of minority strength and equally artifical restriction on the majority party is wholly independent of what occur in any of the other eight ward races for Council.

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16 Under 401(b)(2) and in the 1976 election; No more than 60% representation is representatives chosen at large is prescribed by 401 (d)(3).

Those members hardly reflect a "reasonable" means of attaining a legislative goal. Malapportionment of this dimension would violate this Court's apportionment rules. This malapportionment is no more reasonable if imposed under the new label of a voter-restriction statute.

CONCLUSION

A desirable political climate, one in which there exists a maximum of citizen participation, is a goal universally desired. But like many such goals, it is a subtle and slow-growing bloom, to be nurtured over time by unceasing public watchfulness, growing voter awareness and lively issues. None of these forces can be legislated into being. It is logical that an attempt to legislate into existence the ultimate goal of this, civic participation, constitutes tampering.

Tampering it is. Where legislatures tell voters which political party they may vote for and which not – an historic first for any legislature – it is tampering. And because tampering leads to more tampering, it is dangerous activity for any legislature, forbidden by the plain guarantees against state interference with the free exercise of the political franchise which are gospel in this Court in 1976.

Of equal concern is the new role this tampering would force on this Court, which must now play the Supreme Being of political wisdom, dictating to the voting public elected representatives they plainly do not want. This novel judicial role is light years removed from insuring the right to vote or other basic freedoms. It requires this Court, joining with legislatures, to exercise superior political wisdom in place of 10%, 15%, or as much as 49% of the electorate. This is not a judicial function.

Before this Court takes this function on, it should minimally, order full briefing and argument in this cause. Then, upon full scrutiny, this statute should be enjoined as an unwanted invasion of each voter's political conscience and a clear discrimination against partisan belief.

Respectfully submitted,

BECHHOEFER, SNAPP,
SHARLITT & LYMAN
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Suite 300

By _____
Joseph H. Sharlitt

_____
Bernhard G. Bechhoefer

_____
Joseph J. Lyman

_____
Neal E. Krucoff

Counsel for Appellants

April, 1976

APPENDIX A

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. HECHINGER, et al., Plaintiffs,	:	
v.	:	Civil Action No. 74-1666
ROBERT MARTIN, Chairman, District of Columbia Board of Elections and Ethics, et al., Defendants.	:	

MEMORANDUM AND ORDER

This case is now before the Court on Plaintiffs' Motion For Summary Judgment And For Entry of Permanent Injunction, Defendants' Cross-Motion For Summary Judgment, and the Joint Cross-Motion of Intervenors For Summary Judgment. For the reasons explained herein, plaintiffs' motion is denied, and summary judgment is granted for defendants.

Background

The facts of this case are not in dispute. Plaintiffs Hechinger, Huff, Lewis, Dulcan and Berenson are affiliated Democrats in the District of Columbia. Plaintiff Democratic Central Committee is the District of Columbia's local Democratic party organization. Intervenor Republican Committee is the District of Columbia's local Republican organization. Intervenor Jerry A. Moore, Jr., is an affiliated Republican who was elected on November 5, 1975 to one of four at-large seats on the District of Columbia Council. Intervenor Rich is an unaffiliated voter who was defeated in his bid for one of the four at-large

seats on the Council in the election of November 5, 1975. Defendants Martin and Chapman are chairperson and member respectively on the District of Columbia Board of Elections and Ethics.

Plaintiffs in this case seek a judgment declaring Sections 401(b)(2)[1] and 401(d)(3)[2] of the District of Columbia Self-Government and Governmental Reorganization Act[3] unconstitutional and enjoining the defendant Board from enforcing those limitations. In an earlier action,[4] in which plaintiffs sought similar relief immediately prior to the 1974 election, the Court held that the action should be dismissed, without prejudice to refiling, because it was then too close to that election for the Court to take responsible action. The present action is substantially the same as the earlier action, as permitted by that decision.

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[1] Section 401(b)(2) reads:

> In the case of the first election held for office of member of the Council after the effective date of this title, not more than two of the at-large members (excluding the Chairman) shall be nominated by the same political party. Thereafter, a political party may nominate a number of candidates for the office of at-large member of the Council equal to one less than the total number of at-large members (excluding the Chairman) to be elected in such election.

[2] Section 401(d)(3) reads:

> Notwithstanding any other provision of this section, at no time shall there be more than three members (including the Chairman) serving at large on the Council who are affiliated with the same political party.

[3] P.L. 93-198, 93rd Cong., 87 Stat. 744 (1973).

[4] *Dulcan v. Martin*, CA 74-1498, Decided October 18, 1974.

The District of Columbia Self-Government and Governmental Reorganization Act provides for the election of a Council for the District of Columbia to act as the District's legislature. The Council is made up of thirteen members. Eight are elected from wards, four are elected at-large, and one is elected at-large separately as chairperson of the Council. The purpose of the limitations contained in the sections at issue is to ensure minority representation on the Council (As of March, 1975, 76.55% of the District's qualified voters had affiliated with the Democratic party). The act was signed by The President on December 24, 1973. On May 7, 1974, pursuant to its provisions, the Act was submitted to the voters of the District and was approved by a majority of 82.74% of the vote case. As a result of the November 5, 1974 election, Democrats were elected to all eight ward seats on the Council, to two of the at-large seats, and to the chair of the Council, for a total of 84.6% of the votes on the Council. Plaintiffs now seek to have the Court invalidate Sections 401(b)(2) and 401(d)(3) of the Act on First and Fifth Amendment grounds.

First Amendment

Plaintiffs claim that the statute deprives them of First Amendment rights in two respects. In the first place, it prevents plaintiffs as registered Democrats from exercising their vote in accordance with their political beliefs in the election of at-large councilmen on the District of Columbia City Council. Additionally, according to plaintiffs, the statute prevents them from free and effective association with other Democrats in political activity aimed at electing Democrats to the at-large seats on the Council. Intervenor's version of the question presented by plaintiffs' claims is well stated, i.e. that plaintiffs' claims in this regard present the question whether the Constitution requires

that the political party with the majority of registered voters must have the right in an election for a multi-member body to elect all the members of that body.

We have examined all the authorities cited by plaintiffs in support of their position, and are unable to discern any such requirement. On the contrary, it appears that the minority representation provision is more compatible with the First Amendment than plaintiffs' requirement would be.

No one serious contests the fundamental nature of the rights claimed by plaintiffs under the First Amendment, and the Supreme Court has in fact articulated the concept on many occasions – most recently in *Buckley, et al. v. Valeo, Secretary of the United States Senate, et al.* 44 LW 4127 (January 30, 1976).

But this latest expression from the Supreme Court appears to meet in a somewhat head-on fashion all of plaintiffs' claims in this regard.

> "The Court's decisions involving associational freedoms establish that the right of association is a 'basic constitutional freedom' that is 'closely allied to freedom of speech and a right which, like free speech, lies at the foundation of a free society.' Kusper v. Pontikes, 414 U.S., at 57; Shelton v. Tucker, 364 U.S. 479, 486 (1960). See, e.g. Bates v. Little Rock, 361 U.S. 516, 522-523 (1960); NAACP v. Alabama, 357 U.S., at 460-461; NAACP v. Button, 371 U.S., at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' NAACP

> v. Alabama, supra, at 460-461. Yet, it is clear that '[n]either the right to associate nor the right to participate in political activities is absolute.' Civil Service Comm'n. v. Letter Carriers, 413 U.S. 548, 567 (1973). Even a '"significant interference" with protected rights of political association' may be sustained if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. Cousins v. Wigoda, 419 U.S., at 488; NAACP v. Button, supra, at 438; Shelton v. Tucker, supra, at 488."

44 U.S. LW at 4134.

We think that the Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capitol is a valid one, sufficiently important to warrant the challenged interference with the rights of political association, and that the means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgment of those rights.

But for the restriction of the challenged sections the majority party (Democratic at present) would be able to elect all of its candidates to the council, thus leaving a minority without any input into council activity. The concept of minority representation, or stated in another fashion, limitations on majority representation, is entirely consistent with First Amendment principles of freedom of expression and association, and appears altogether legitimate as a legislative objective. Various schemes for accomplishing the purpose of such legislation, including measures identical, or nearly so, to the sections here challenged have been examined in the light of constitutional standards and declared to be valid.

In *Kaelin v. Warden*, 334 F.Supp. 602 (E.D. Pa. 1971) Pennsylvania adopted a scheme known as limited voting in an effort to encourage what the Court described as ". . . a fairer or more effective representation that would otherwise result if a simple plurality rule were used in which the majority elects all the commissioners, for this would necessarily discriminate by entirely discounting the votes of the minority electors". In an election for a board of three commissioners each elector could vote for no more than two persons. The three having the highest number of votes were elected. The Court characterized the purpose as a "legitimate political goal", and the limited voting scheme an "acceptable method" to accomplish it.

Illinois' minority representation effort limits each party's nominations for 177 seats in the State House of Representatives to 188. A constitutional attack on the statute was rejected by the state's highest court, which observed ". . . minority representation in the House is a principle firmly entrenched in the Demoncratic traditions and ideologies of this state". *People v. Carpentier*, 30 Ill. 2d 590, 198 NE 2d 517 (1964).

Assurance of some minority representation on the city council was the objective of a provision of the New York City charter which combined the features of limited voting by the individual elector along with a limitation on the number of candidates of any particular political party. The council was to consist of a single member elected from each ward in the city in addition to ten at-large members – two elected from each of five boroughs. Political parties were restricted to nominating only one candaidate for the at-large seats in each borough, and each elector could vote for only one boroughwide candidate. A provision for some minority representation in a multiple body

was recognized as a laudatory legislative endeavor by Judge Fuld in an opinion rejecting an attack on the charter provision on constitutional grounds. *Blaike v. Power*, 13 N.Y. Ed. 134, 193 N.E.2nd 55 (1963), *Appeal dismissed for want of a substantial federal question*, 375 U.S. 439 (1964). He stated that "such representation can play an important role in a democracy", and cited the language of an earlier decision of his court which characterized the concept (minority representation) as "an attempt to make representative government a reality" (*Johnson v. City of New York*, 274 N.Y. 411, 430, 9 N.E. 2nd 30, 38).

A Connecticut minority representation statute similar to the one in *Blaike, supra*, limits the number of candidates a political party can nominate for vacancies on multi-member boards, commissions, etc., and also the number for whom an elector can vote. In *Lo Frisco v. Schaffer*, 341 F. Supp. 743 (D. Conn. 1972) a unanimous three-judge district court, in turning away a constitutional attack on the restrictions, agreed with the legislature that it was "important, on boards . . . to have a significant minority voice, to air and introduce ideas which the majority might not otherwise consider"' and observed that "the statute was not meant to wrest power and control from the majority, but to assure intelligent decision-making". (*Id.* at 750)

In *Gaffney v. Cummings*, 412 U.S. 735 (1973) the Supreme Court recognized a so-called "political fairness principle" in the allocation of party strength when it approved a districting scheme in Connecticut designed "to produce a different – a more 'politically fair' – result than would be reached with elections at large in which the winning party would take 100% of the legislative seats . . ." Implementation of this policy of political

fairness was recognized as a sufficient basis for allowing some deviation from absolute population equality among voting district contemplated by the one man-one vote concept. Obviously this same policy of political fairness prompted the Congress to impose the restrictions here challenged. Indeed, the chairman of the House District Committee articulated such a rationale when he stated that the scheme constituted a fair and equitable protection of minority interests.

Plaintiffs' suggestion that the Supreme Court overlooked, or otherwise somehow missed, the glaring, constitutional infirmities present in both *Blaike* and *Lo Frisco* is unpersuasive. We believe it is more likely that those infirmities, so apparent to plaintiffs, were not discernible to the Court not because of any oversight, but because they in fact do not exist, and that the Court left *Blaike* and *Lo Frisco* intact for the same reasons which prompted it to conclude in *Gaffney v. Cummings, supra,* at 754:

> What is done in so arranging for elections, or to achieve political ends or allocate political power, is not wholly exempt from judicial scrutiny under the Fourteenth Amendment. As we have indicated, for example, multimember districts may be vulnerable, if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized. See White v. Regester, supra; Whitcomb v. Chavis, supra. See also Gomillion v. Lightfoot, supra. Beyond this, we have not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and within

> quite tolerable limits, succeeds in doing so. There is no doubt that there may be other reapportionment plans for Connecticut that would have different political consequences and that would also be constitutional. Perhaps any of appellees' plans would have fallen into this category, as would the court's had it propounded one. But neither we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State.

It is true, as plaintiffs point out, that *Gaffney* is an apportionment case; we think however that the broad policy considerations articulated in the quoted language apply with equal force to the instant case. The election law here at issue does not fence any grupo out; its purpose and effect is to ensure that political minorities are represented on the Council and that dissident voices are heard in the legislative process. In the view of the Court, the purpose of the legislation is entirely harmonious with that of the First Amendment, and the means chose to further that purpose are well within constitutional imits.

Fifth Amendment

The gist of plaintiffs' Fifth Amendment claims is that the law unconstitutionally discriminates against all political parties by allowing independent candidates to be elected to all four at-large seats while restricting candidates of any party to holding two of the four seats. Plaintiffs cite *Blaike v. Power, supra,* as a basis for their contentions,

arguing that the New York statute involved applied to both parties and independent bodies, and therefore did not discriminate in favor of independents as the District of Columbia statute allegedly does.

Plaintiffs fundamentally misunderstand the concepts involved. The New York law prohibited any group, whether it met the qualifications for a political party or not, from holding more than one seat per borough. Likewise, the D. C. law prohibits any group from holding more than two at-large seats on the Council. Plaintiffs somehow equate the phrase "independent organization" in the New York context. The two are distinct, because under the D. C. law a New York "independent organization" would be covered as a political party. 1 D.C. Code § 1121(j). The plaintiffs further fail to recognize that an independent candidate is exempted from the law's restrictions precisely because that person is *not* supported by an organization which is also supporting other candaidates. The entire purpose of the restriction is to prevent one organization's candidates from capturing more than two at-large seats on the Council; that danger does not exist, by definition, with independent candidates, since they are not related organizationally to any other candidates running. "Independent candidates" is not a party or organizational label, it is a label of, for want of a more appropriate word, independence. No discrimination or Fifth Amendment problem is apparent to the Court on this scheme.

Accordingly, it is by the Court this 24th day of March, 1976,

ORDERED, that plaintiffs' motion be, and hereby is, denied; and

FURTHER ORDERED, that the cross-motions of intervenors and defendants be, and hereby are, granted.

/s/ J. Skelly Wright
United States Circuit Judge

/s/ William B. Bryant
United States District Judge

/s/ John H. Pratt
United States District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOHN W. HECHINGER, et al.,
Plaintiffs,

v.

ROBERT MARTIN, Chairman
District of Columbia Board
of Elections and Ethics, et al.,
Defendants.

Civil Action
No. 74-1666

JUDGMENT

Pursuant to the Memorandum and Order attached hereto, judgment in the above-captioned case is hereby entered in favor of the intervenors and the defendants.

/s/ J. Skelly Wright,
United States Circuit Judge

/s/ William B. Bryant
United States District Judge

/s/ John H. Pratt
United States District Judge

Dated: March 24, 1976

Supreme Court, U. S.
FILED
MAY 20 1976
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1975

No. 75-1532

JOHN HECHINGER, *et al.*,
Appellants,

v.

DR. ROBERT MARTIN, CHAIRMAN,
DISTRICT OF COLUMBIA BOARD OF
ELECTIONS AND ETHICS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO DISMISS OR AFFIRM

WINFRED R. MUNDLE
General Counsel
DISTRICT OF COLUMBIA BOARD
OF ELECTIONS AND ETHICS

Attorney for Appellee Board
District Building
Washington, D. C. 20004

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IN THE

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DR. ROBERT MARTIN, CHAIRMAN,
DISTRICT OF COLUMBIA BOARD OF
ELECTIONS AND ETHICS, *et al.*,
Appellees.

On Appeal from the United States District Court for the District of Columbia

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MOTION TO DISMISS OR AFFIRM

For the reasons set forth below, appellee Board move the Court to dismiss the appeal herein or, alternatively, to affirm the order entered on March 24, 1976, in the above-entitled cause on the ground that the question presented is so insubstantial as not to require further argument.

QUESTION PRESENTED

Appellee Board does not agree that the record in this case will support the questions for review as given by

the appellants, but believes the record more adequately supports the following question:

> WHETHER THE CONSTITUTION REQUIRES THAT THE POLITICAL PARTY WITH THE MAJORITY OF REGISTERED VOTERS MUST HAVE THE RIGHT IN AN ELECTION FOR A MULTI-MEMBER BODY TO ELECT ALL THE MEMBERS OF THAT BODY.

CONSTITUTIONAL PROVISIONS, AND LOCAL STATUTES INVOLVED

Appellants have set forth the applicable constitutional and statutory provisions involved.

STATEMENT OF THE CASE

1. *The Parties.* Appellants Hechinger, Huff, Lewis, Dulcan and Berenson are affiliated Democrats in the District of Columbia. Appellant Democratic Central Committee is the District of Columbia's local Democratic party organization. Appellee-Intervenor Republican Committee is the District of Columbia's local Republican organization. Appellee-Intervenor Jerry A. Moore, Jr. is an affiliated Republican who was elected on November 5, 1975 to one of four at-large seats on the District of Columbia Council. Appellee-Intervenor Rich is an unaffiliated voter who was defeated in his bid for one of the four at-large seats on the Council in the election of November 5, 1975. Appellees Martin and Chapman are chairperson and members respectively on the District of Columbia Board of Elections and Ethics.

2. *The Appellants' Contentions.* The challenged statutory provisions, 401(b)(2) and 401(d)(3) of the District of Columbia Self Government and Governmental Reorganization Act, prohibit a political party from occupying 100% of the seats (memberships) on the Council

of the District of Columbia. Appellants contend that these provisions are unconstitutional on various grounds and urge that the question of its constitutionality is of sufficient substantiality to require plenary consideration by this Court.

3. *Background of Challenged Provisions.* Varieties of 'home rule' legislation for the District of Columbia have been considered by Congress over the years. *See* S. Rep. No. 93-219, 93d Cong., 1st Sess. 3 (1973). The legislation that evolved into the District of Columbia Self Government and Governmental Reorganization Act was itself the subject of extensive consideration and debate.

In June 1973, the Senate District Committee reported S. 1435, which provided for an eleven member Council, made up of eight members to be elected from the wards and two members to be elected at large in partisan elections. S. Rep. No. 93-219, 93d Cong., 1st Sess. 5, 12 (1973). The bill was passed by the Senate in this form.

By comparison, the companion legislation introduced in the House, H.R. 9682, provided for a thirteen member Council, with eight ward members and five at large members (including the Chairman). The House bill included, and was reported by the House District Committee with, the 'minority party' clause which provided that not more than two of the at large members (other than the Chairman) could be nominated by any one party. H.R. Rep. No. 93-482, 93d Cong., 1st Sess. 8 (1973). However, even this modified partisan election procedure was objected to by dissenting members of the House Committee, who felt that because of the interweave of federal and local interests in the District, and because of the extremely large number of federal and District employees in the District who are barred from partisan political activity by the Hatch Act, the Council election should be

completely nonpartisan.[1] This would have the advantage, they said, of permitting federal employees to 'take an active part in the campaign of a nonpartisan candidate for the local offices.' *Id.* at 145-46.

The views of the Committee minority prevailed on the Floor of the House, and H.R. 9682 was amended and passed by the House to provide for completely nonpartisan Council elections. 119 Cong. Rec. H. 8856 (daily ed. October 10, 1974).

After a lengthy House-Senate conference, the inconsistency between the House and Senate bills was resolved by adopting the minority representation provision originally included in H.R. 9682. H.R. Rep. 93-703, 93d Cong., 1st Sess. 13 (1973). In presenting the Conference Report to the House, the Chairman of the House District Committee characterized this feature of the Report as 'the single most important difference' between the two bills. While supporting the concept of partisan elections, which was insisted upon by the Senate Conferees, he stated that the compromise 'built into the partisan provision a protection of minority interests'—a protection he characterized as 'fair and equitable.' 119 Cong. Rec. H. 11509 (daily ed. Dec. 17, 1973) (remarks of Rep. Diggs).[2]

The chairman of the Senate District Committee similarly explained to the Senate that the compromise version of the bill 'guaranteed minority party representation' on the Council. 119 Cong. Rec. S. 23375 (daily ed. Dec. 19, 1973) (remarks of Sen. Eagleton). While one Committee member nevertheless voiced concern that as many as 40% of the registered voters in the District

[1] The dissenters pointed out that 63 of the 100 largest cities in the U.S., and 60% of the cities with populations over 100,000, conduct nonpartisan elections.

[2] Even this compromise did not satisfy certain of the dissenters on the House District Committee, who still viewed the Act providing for completely partisan elections. 119 Cong. Rec. H.11517-18 (daily ed. Dec. 17, 1973) (remarks of Rep. Broyhill).

would still be foreclosed by the Hatch Act from full participation in Council election, he nevertheless voted in favor of the compromise. *Id.* at S. 23382 (remarks of Sen. Domenici). The Conference compromise was ultimately approved and it became law.

ARGUMENT

1. THE COURTS, INCLUDING THIS COURT, HAVE CONSISTENTLY HELD THAT MINORITY REPRESENTATION STATUTES SUCH AS THE ONE CHALLENGED HERE ARE CONSTITUTIONAL.

The issue in this case has been decided consistently by earlier decisions of this court. There are no conflicts between the decision below and any other court decision.

A comparison of arguments and authorities advocated by Appellants in their Jurisdictional Statement and the District Court decision (JS 1a) compells the conclusion that the District Court treated fully each argument, considered carefully each authority, and unanimously rejected Appellants' position. The District Court weighed and tested each contention of Appellants by every conceivable means—(a) the language of the provisions (JS 2a); (b) the legislative history (JS 3a); and the purposes of the provisions (JS 3a). The District Court conscientiously scrutinized Appellants' authorities and brief. After this intensive examination, the District Court reached the same rational and well-founded conclusion as was reached by this Court in *Buckley*, et al. v. *Valeo, Secretary of the United States Senate*, et al. 44 U.S.L.W. 4127, when this Court rejected absolutism of First Amendment rights and/or other constitutional rights as being absolute per se.

The Court below stated, on page 4(a) of Appellant's jurisdictional statement the following:

"No one serious contests the fundamental nature of the rights claimed by plaintiffs under the First Amendment, and the Supreme Court has in fact articulated the concept on many occasions—most recently in Buckley, et al. v. Valeo, Secretary of the United States Senate, et al., 44 LW 4127 (January 30, 1976).

But this latest expression from the Supreme Court appears to meet in a somewhat head-on fashion all of plaintiffs' claims in this regard.

'The Court's decisions involving associational freedoms establish that the right of association is a basic constitutional freedom' that is 'closely allied to freedom of speech, lies at the foundation of a free society.' Kusper v. Pontikes, 414 U.S., at 57; Shelton v. Tucker, 364 U.S. 479, 486 (1960). See, e.g. Bates v. Little Rock, 361 U.S. 516, 522-523 (1960); NAACP v. Alabama, 357 U.S., at 460-461; NAACP v. Button, 371 U.S., at 452 (Harlan, J., dissenting). In view of the fundamental nature of the right to associate, governmental 'action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny.' NAACP v. Alabama, supra, at 460-461. Yet, it is clear that '[*n*]*either the right to associate nor the right to participate in political activities is absolute.' Civil Service Comm'n.* v. *Letter Carriers, 413 U.S. 548, 567 (1973) Even a '"significant interference" with protected rights of political association' may be sustained* (italicizing added by Appellee Board), if the State demonstrates a sufficiently important interest and employs means closely drawn to avoid unnecessary abridgment of associational freedoms. Cousins v. Wigoda, 419 U.S., at 488; NAACP v. Button, supra, at 438; Shelton v. Tucker, supra, at 488." 44 U.S. LW at 4134.

We think that the Congress' interest in facilitating some representation of political minorities on the

City Council of the nation's capitol is a valid one, sufficiently important to warrant the challenged interference with the rights of political association, and that the means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgment of those rights.

But for the restriction of the challenged sections the majority party (Democratic at present) would be able to elect all of its candidates to the council, thus leaving a minority without any input into council activity. The concept of minority representation, or stated in another fashion, limitations on majority representation, is entirely consistent with First Amendment principles of freedom of expression and association, and appears altogether legitimate as a legislative objective. Various schemes for accomplishing the purpose of such legislation, including measures identical, or nearly so, to the sections here challenged have been examined in the light of constitutional standards and declared to be valid."

The concept of minority representation under the actual facts of the case before this court involves at best only minimal participation, when one observes that two seats (members) out of 13 equals only about a 15% shortfall (participation) or no more than a possible maximum of about 85% control (by the Democrats who measure 76.55% of the registered voters). There are no measures, parliamentary or procedural requirements of the Council that require more than a 66% vote to secure an absolute exercise of a group's will on an enactment or procedure.

This Court in *Williams* vs. *Rhodes*, 393 U.S. at 34, stated:

> "the number of voters in favor of a party, along with other circumstances, is relevant in considering whether state laws violate the Equal Protection

> Clause. And, as we have said, the State is left with broad powers to regulate voting, which may include laws relating to the qualification and functions of electors. But here the totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights which we hold is an invidious discrimination, in violation of the Equal Protection Clause."

But here the totality of the District of Columbia restrictive laws taken as a whole imposes no burden on voting and associational rights which might could be an invidious discrimination in violation of the Equal Protection Clause.

Admittedly, minority representation dilutes the vote of the majority since to protect the minority the full effect of the majority vote is not permitted. But without minority representation, the vote of the minority is not only diluted, but it may be worthless, at least insofar as securing party representation is concerned. Congress could have legislated nonpartisan elections, however, it must be further noted that under the District of Columbia scheme, there is no guaranteed *minority party representation* at all. As a matter of fact four independents could win. We feel it is neither anti-democratic nor anti-majoritarian to limit the power of a bare majority to secure political representation in excess of its actual strength at the polls.

The Supreme Court has often recognized that the states should be afforded flexibility to tailor viable local governmental structures to meet their particular needs. (Congress could have legislated nonpartisan elections). Hadley v. Junior College District, supra 397 U.S. at 59, 90 S. Ct. 791, Avery v. Midland County, 390 U.S. 474, 485, 88 S. Ct. 1114, 20 L Ed 2d 45 (1968); et al. See also Blaikie v. Wagner, 250 F Supp 364 (S.D. N.Y. 1965).

The idea of guaranteeing minority representation in legislatures and local government bodies is by no means new and has been considered and upheld by various federal courts including the Supreme Court.

In fact, majority control is not the rule in many contexts. The State of West Virginia, *Gordon v. Lance*, 403 U.S.l., 91 S.Ct. 1889, 29 L.Ed. 2d 273 (1971), has a constitutional and statutory requirement that 60% of the voters in a referendum must approve an increase in bonded indebtedness or tax rates beyond those established by the state constitution. The Supreme Court upheld this requirement declaring it not violative of the Fourteenth Amendment and further saying: 403 U.S. at 6:

> ". . . But there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue. On the contrary, while we have recognized that state officials are normally chosen by a vote of the majority of the electorate, we have found no constitutional barrier to the selection of a Governor by a state legislature, after no candidate received a majority of the popular vote. *Fortson* v. *Morris*, 385 U.S. 231 (1966)."

The Charter of New York City provides for the system of "limited voting" in order to select 10 councilmen at large for New York City's Council. This system provides for two councilmen to be elected from five boroughs and limits "each voter to vote for a single borough—wide candidate, also providing that a party (or independent body) may nominate only one candidate for councilmen at large in each borough, "see *Blaike v. Power*, 13 N.Y. 2d 134, 193 N.E. 2d 55 (1963) *appeal dismissed for want of a substantial federal question*, 375 U.S. 439 (1964).

This system of voting was approved by the voters of New York City which is similar to the overwhelming approval by the voters of the District of Columbia of minority representation on the Council.

The New York case is not distinguishable from our case even though there is statement that in New York the independent bodies face the same nomination restriction in the "limited voting" system in New York City as the political parties and, therefore, this fact distinguishes this case from ours. However, "independent body" as defined in New York election law has a different meaning than an independent candidate for our "at large" seats on the Council of the District of Columbia. In New York, the statutory definition of an "independent body" refers to an "organization or group of voters" which nominates a "candidate or candidates" for office. This definition does not include the independent candidate for the Council of the District of Columbia. Therefore the independent which the plaintiffs claim is included under the restrictions of the New York statute is not the same type of independent which exists under District law. An independent in the District represents himself and is not part of an organized group which places candidates on the ballot. Therefore, using a District of Columbia definition for an independent, this candidate would not be subject to the restriction placed on political parties in New York.

A second state which has a minority representation statute is Connecticut and a three judge court with Judge J. Joseph Smith writing the opinion upheld the constitutionality of this procedure as it applies to local school boards. See *LoFrisco v. Schaffer*, 341 F. Supp 743 (D. Conn. 1972) *aff'd per curiam*, 401 U.S. 972 (1972). In *LoFrisco*, the plaintiff was, *inter alia*, challenging the limitation placed on a town committee or caucus allowing it to nominate only as many people as one elector

can vote for at the polls. Since electors can vote for only half of the vacancies on the board if an even number are being selected or for a bare majority if an odd number are being selected, this restricts the number of party nominees.

In *Hechinger*, restrictions are placed on all political parties, and independent groups which put up two or more candidates fall under the same restrictions. Therefore, it is only the truly independent candidate, not affiliated with any organization which puts up candidates for other at large seats, which is exempt from the restriction in the District of Columbia. There is no practical reason why a truly independent candidate without the resources of an established, political organization should be placed under the same restrictions as that of an organization.

The Supreme Court in *Gaffney v. Cummings*, 412 U.S. 735 (1973) observed that a redistricting plan could use a "political fairness principle" in making up Senate and House Districts for the state legislature of Connecticut. In that case, a three-member Board designed new legislative districts for the State after the decennial census. In drawing up the districts, the Board drew up a plan which would achieve a rough approximation of the statewide political strengths of the Democrats and Republican Parties. The Court, after declaring the deviations in population presented by the plan to be acceptable, made the following statement concerning the intentional approximation of party strength by the Board: 412 U.S. at 753:

> . . . The very essence of districting is to produce a different—a more "politically fair"—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats . . .

The "political fairness principle" in *Gaffney, supra*, is similar to that in *Hechinger*. In the instant case the

Congress designed the Council knowing that it was assuring minority party representation but also knowing that the system required approval by the voters. It is evident from *Gaffney* that this action does not violate constitutional standards of Equal Protection.

It is obvious that the restriction on two Council seats is certainly in line with the above cases and does not violate Equal Protection Standards as outlined by these cases. This minimal restriction was designed by Congress with the overwhelming approval of the voters of the District and it has had little impact on the structure of political parties in the District of Columbia.

Protection of minority interest comports with the views of our founding fathers as found in the Federalist Papers. This protection of minority interest is characterized by the House District Committee Chairman, a Democrat, as "fair and equitable." 119 Cong. Rec. H. 11509 (daily ed. Dec. 17, 1973) (remarks of Rep. Diggs).

There is perhaps no more eloquent expression of this concern than The Federalist No. 51, the authorship of which has been variously attributed to Alexander Hamilton and to James Madison. In speaking of the role of the federal system in preserving the peoples' liberties, the author stated principles of political philosophy which are equally persuasive of the necessity of maintaining a diversity of parties within the legislature:

> "It is of great importance in a republic, not only to guard the society against the oppression of its rulers; but to guard one part of the society against the injustice of the other part. Different interests necessarily exist in different classes of citizens. If a majority be united by a common interest, the rights of the minority will be insecure. There are but two methods of providing against this evil: The one by creating a will in the community independent of the majority, that is, of the society itself; the other by comprehending in the society so many separate descriptions of citizens, as will render an unjust combination of a majority of the whole, very improbable, if not impracticable. The first method prevails in all governments possessing an hereditary or self-appointed authority . . . The second method will be exemplified in the federal republic of the United States."
>
> *The Federalist*, Jacob E. Cooke (Middletown, Conn. 1961) 351

Again and again this view was expressed in various ways by the authors of the Federalist Papers. See, for example, Number 26 at 168, Number 50 at 346-6, and Number 70 at 475 (all page references are to *The Federalist*, supra.)

The debate over the philosophy and structure of the new nation found its fruition in the Constitution which, of course, contains many obstacles to rule by the majority; it is singularly ironic that the Appellants now invoke this document to strike down the modest restraint contained in the Act, which still leaves their party, which represents only 76.5 percent of the registered voters, with a 84.9 percent of the actual voting power (11 out of 13 seats) on the District of Columbia Council. The actual number of Democrats voting the Primary Election of September 10, 1974, fell much short of 50% of the registered Democrats. Therefore it is fair to submit that their actual council voting power, even following the application of the restrictions of the Act, far exceeds the percentile of registered Democrats who elected in the primary their party colleagues.

We note further that appellants contend that the restrictions amount to 50% of at large seats on the Council. Whereas this is true nevertheless, we submit that the proper focus is upon the Council as a single entity. As a legislative body composed of 13 members representing

all residents, those registered to vote as well as those not registered. Each member of the Council from a ward or at large has the same vote that each of the other has and the quorum requirement of the Council to do business treat both the ward and at large Council members equally.

2. THERE IS NO DISCRIMINATION IN FAVOR OF INDEPENDENTS.

The Appellants make one attempt to distinguish the District of Columbia minority representation provisions from those which have been consistently upheld by the courts in other cases. The Appellants claim that the District of Columbia Act violates the Fifth Amendment by creating an invidious discrimination in favor of independents. The gist of Appellants' claim is that the Act, while allowing any single party to hold just eleven of the thirteen city council seats, permits independents, at least theoretically, to be elected to all thirteen seats.[3]

In advancing that claim, however, the Appellants, as the court below stated, "fundamentally misunderstand the concepts involved." (JS at 10a).

In the District of Columbia, the term "independent" is not a party or organizational label. Independent candidates and voters are not a single, cohesive mass. On the contrary, independents are not only independent from the established political parties, *they are also independent from each other.* Each independent candidate, after obtaining *on his own* the requisite number of signatures

[3] It deserves emphasis that the Act restricts the number of seats which may be held by any *single* party. There is no limitation on the number of seats which may be held by various parties. In fact, all members of the council were elected as members of a political party. Eleven are Democrats, one is Republican and one is a member of the Statehood Party. No independent candidate gained election to the council in the 1975 elections.

to be placed on the ballot, stands for election individually. He stands alone. By the very nature of his candidacy, an independent candidate is restricted to nominating and electing but one candidate—himself. Any further restriction is, by definition, unnecessary.

Moreover, under District of Columbia law, the moment a candidate chooses not to run independently, but decides to form or become a part of an organization putting forth a slate of candidates under the label of that organization—regardless of the name that organization adopts, whether it be the Democratic Party, the Republican Party, the Statehood Party, or the Capitol City Republican Club—he becomes the candidate of a political party and subject to the restrictions placed by the Act on political parties.[4] So long, however, as a candidate remains independent and chooses to run as an independent, he is not expressly restricted by the Act. He is already restricted by his choice to run independently.

[4] A "political party" under D.C. Code § 1-1121(j) is:

> "an association, committee, or organization which nominates a candidate for election to any office and qualifies . . . to have the names of its nominees appear on the election ballot as the candidate of that association, committee, or organization."

In other words, an organization, committee or association which nominates candidates to run *under* its label is a political party and subject to the restrictions of the Act.

CONCLUSION

It is obvious that the provisions challenged here do not violate the Constitution. The minimal restriction set by those provisions was designed by Congress with the overwhelming approval of the voters of the District. It is fully in accord with the restrictions adopted in numerous other jurisdictions which have, without exception, been approved by the courts. The present case presents no substantial issue and this Court should, therefore, summarily dismiss the appeal herein or, alternatively, to affirm the decision below.

Respectfully submitted,

/s/ Winfred R. Mundle
WINFRED R. MUNDLE, ESQ.
General Counsel
DISTRICT OF COLUMBIA BOARD
OF ELECTIONS AND ETHICS

Attorney for Appellee Board
District Building
Washington, D. C. 20004

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-1532

JOHN HECHINGER, *et al.*,
Appellants,

v.

DR. ROBERT MARTIN,
Chairman, District of Columbia Board of
Elections and Ethics, *et al.*,
Appellees,

FRANK H. RICH, JERRY A. MOORE, JR., and
DISTRICT OF COLUMBIA REPUBLICAN COMMITTEE,
Intervenors-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MOTION TO AFFIRM OF INTERVENORS-APPELLEES

DAVID BONDERMAN
THOMAS B. WILNER
1229 - 19th Street, N.W.
Washington, D.C. 20036

DENNIS J. WHITTLESEY
815 Connecticut Ave., N.W.
Washington, D.C. 20006
Attorneys for Intervenor-Appellee Frank H. Rich

SAMUEL C. JACKSON
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorney for Intervenor-Appellee Jerry A. Moore, Jr.

AUSTIN P. FRUM
1220 - 19th Street, N.W.
Washington, D.C. 20036
Attorney for Intervenor-Appellee District of Columbia Republican Committee

Of Counsel:
ARNOLD & PORTER
Washington, D.C.

STROOCK & STROOCK
& LAVAN
Washington, D.C.

Dated: May, 1976

Washington, D.C. • THIEL PRESS • (202) 638-4521

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Intervenors-Appellees hereby move that the judgment and decree of the District Court be summarily affirmed on the ground that the question raised is so insubstantial that no further argument is required.

QUESTION PRESENTED

The sole question presented by this appeal is whether the Constitution requires that a political party with a majority of registered voters must have the right in an election for a multi-member body to elect all the

members of that body. The District Court, following the decisions of every court to consider this issue, held that the Constitution contains no such requirement.

STATEMENT OF THE CASE

This case involves an attack by Appellants on the constitutionality of Sections 401(b)(2) and 401(d)(3) of the District of Columbia Self-Government and Governmental Reorganization Act of 1973, P.L. 93-198, 87 Stat. 744 (1973) ("the Act" or "the D.C. Self-Government Act"), which prohibit any single party from holding more than 85 percent of the seats on the District of Columbia City Council.[1]

The Appellants are the District's local Democratic Party, which as of March, 1975, registered 76.5 percent of the District's voters, and individual Democrats in the District of Columbia. Appellees-Intervenors are the only Republican member of the District Council; a registered independent voter in the District who ran unsuccessfully as an independent for a seat on the council; and the local Republican Party in the District.

The D.C. Self-Government Act, which allows citizens of the District their first experience in self government in many years, was passed by both houses of Congress and signed by the President in 1973. It was then submitted to the citizens of the District of Columbia for ratification and approved by 82.7 percent of the District's voters.

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[1]Although the appellants specifically direct their attack at these two sections of the Act, the Act contains no severability clause. The absence of a severability clause was intentional since such a clause was included in the original version of the bill (S. 1435) but was specifically deleted in conference. In effect, therefore, this appeal presents a challenge to the entire D.C. Self-Government Act.

The Act provides for the election of a Mayor to act as the executive of the District of Columbia, and of a council to act as the District's legislature. The council is made up of thirteen members. Eight are elected from the wards; five, including the chairperson, are elected at large. In order to ensure that the interests of political minorities would be represented on the council, Congress included Sections 401(b)(2) and 401(d)(3) in the Act. These sections, which are the subject of Appellants' attack, prohibit any party from nominating candidates for more than three of the five at large seats or a total of eleven of the thirteen seats on the council.[2]

In accordance with those provisions, the Democratic Party nominated eleven candidates for the thirteen city council seats to be filled in the November, 1974 election—the first election held under the Act. All eleven of the Democratic candidates were elected, along with one Republican and one member of the D.C. Statehood Party. The Democratic Party, therefore, now has 84.6 percent of the votes on and complete control of the city council.[3] The Appellants now claim that the minority representation provisions of the Act violate the Constitution. They claim that the Constitution requires that their party have the right to nominate and elect all the

---

[2]These sections were a compromise proposed by Democrats in Congress in response to the proposal that elections for the District's council be held on a completely non-partisan basis. The Chairman of the House District Committee stated that the compromise "built into the partisan provision a protection of minority interests"—a protection he characterized as "fair and equitable." 119 Cong. Rec. H. 11509 (daily ed. Dec. 17, 1973) (remarks of Rep. Diggs).

[3]Under the Act, no issue requires more than a two-thirds majority of the council.

members of the city council even though their party represents only 76 percent of the voters.

ARGUMENT

I.

THE PRECISE CLAIMS MADE BY THE APPELLANTS HERE HAVE BEEN UNIFORMLY AND CONSISTENTLY REJECTED BY THE COURTS.

Sections 401(b)(2) and 401(d)(3) of the D.C. Self-Government Act were carefully designed by Congress to ensure that the approximately 24 percent of the District's citizens who are not members of the majority party would not be completely excluded from a voice in the city council. The provisions Congress adopted to accomplish that purpose, which provide only minimal representation to minorities, are both reasonable and constitutional.

As the court below held:

> "We think that the Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capitol is a valid one . . . and that the means adopted to promote that interest are reasonable and do not amount to an unnecessary abridgement of [constitutional] rights.
>
> "But for the restriction of the challenged sections the majority party (Democratic at present) would be able to elect all of its candidates to the council, thus leaving a minority without any input into council activity. The concept of minority representation, or stated in another fashion, limitations on majority representation, is entirely consistent with First Amendment principles of freedom of expression and association, and appears altogether legitimate as a legislative objective." (J.S. at 5 a.)

That decision by the District Court was in accord with the decisions of every court which has considered this issue. Just recently, in *Gaffney v. Cummings*, 412 U.S. 735 (1973), this Court reaffirmed the principle that achieving a balance between political parties reasonably consistent with their voting strength is a legitimate legislative objective. In that case, a bipartisan board in Connecticut drawing voting district boundaries departed somewhat from absolute population equality in order to "achieve a rough approximation of the statewide political strengths of the Democratic and Republican Parties." 412 U.S. at 752. The Court rejected a challenge to that plan in terms which are directly relevant here:

> "The very essence of districting is to produce a different—a more 'politically fair'—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. . . .
>
> ". . . [J]udicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so. . . . [N]either we nor the district courts have a constitutional warrant to invalidate a state plan, otherwise within tolerable population limits, because it undertakes, not to minimize or eliminate the political strength of any group or party, but to recognize it and, through districting, provide a rough sort of proportional representation in the legislative halls of the State." 412 U.S. at 753-54.

The Appellants argue that *Gaffney* is inapplicable because it is an apportionment case. But the policy considerations articulated in that case certainly apply here. And, in any event, the courts have considered, and consistently rejected, constitutional challenges to minor-

ity representation statutes virtually identical to the one at issue here.

Blaikie v. Power, 13 N.Y.2d 134, 193 N.E.2d 55 (1963), *appeal dismissed for want of a substantial federal question,* 375 U.S. 439 (1964), involved an attack on a provision of the New York City charter designed—as was the statute at issue here—to assure some minority representation on the city council. The New York council consists, in addition to a single member elected from each ward in the city, of ten at-large members, two elected from each of the five city boroughs. In order to ensure the representation of minority interests on the council, the New York charter prohibited any party from nominating more than one candidate for councilman at large in each borough. In addition, and beyond the statute challenged in this case, the New York provision allows each elector to vote for only a single borough-wide candidate. The court rejected a claim that the New York plan violated the Constitution:

> ". . . [The] system necessarily involves a limitation of voting, imposed on all voters alike, in order to make possible of achievement some minority representation in a multiple body. . . .
>
> "The repeated efforts of New York City extending over the last century, to provide some form of minority representation in the machinery of local government is evidence of the widespread feeling that such representation can play an important role in a democracy. Indeed, . . . it [is] 'an attempt to make representative government a reality.'" 193 N.E.2d at 59.

In *LoFrisco v. Schaffer,* 341 F. Supp. 743 (D.Conn.), *aff'd per curiam,* 401 U.S. 972 (1972), the plaintiff, a registered Republican voter, challenged a Connecticut

minority representation statute also limiting the number of candidates any party could nominate—in that case, for the local boards of education. Unlike the provisions challenged here, the Connecticut statute also limited the number of board vacancies for which any elector could vote. A unanimous three-judge district court held that the purpose underlying the statute—"to have a significant minority voice, to air and introduce ideas which the majority might not otherwise consider . . . to assure intelligent decision-making"—was entirely constitutional and more than justified any dilution of the majority party's power. 341 F. Supp. at 750.

Again, in *Kaelin v. Warden,* 334 F. Supp. 602 (E.D. Pa. 1971), a three-judge court rejected a constitutional attack on the Pennsylvania minority representation statute which limited each elector to vote for no more than two county council candidates for the three vacancies to be filled each election:

> "Nothing in the Constitution militates against a scheme which is designed to encourage some minority representation. . . .
>
> "The statute may be viewed as having an effect which encourages a fairer or more effective representation than would otherwise result if a simple plurality rule were used in which the majority elects all the commissioners, for this would necessarily discriminate by entirely discounting the votes of the minority electors." 334 F. Supp. at 605.

And, in *People v. Carpentier,* 30 Ill. 2d 590, 198 N.E.2d 514 (1964), the court rejected a challenge to the Illinois minority representation statute which limited each party to nominate no more than 118 of the 177 at-large spots to be filled in the Illinois House of Representatives:

> ". . .[M]inority representation in the House is a principle firmly entrenched in the democratic traditions and ideologies of this State." 198 N.E.2d at 517.

In short, the courts, without exception, have held that minority representation statutes almost identical to the one enacted by Congress for the District of Columbia, and indeed going beyond it, are not only constitutionally permissible but are a wise and beneficial exercise of the legislative power.

II.

THE STATUTE IS NOT DISCRIMINATORY.

The Appellants make a single attempt to distinquish the minority representation provisions involved here from those consistently upheld in other cases. The Appellants contend that the D.C. Act creates an invidious discrimination in favor of independents by permitting independent candidates to run for all thirteen seats on the city council.[4] There is, however, no discrimination here, invidious or otherwise. The Appellants simply misunderstand the nature of "independents" in the District of Columbia.

The purpose of the challenged minority representation provisions is to prevent the candidates of a single party from capturing more than eleven of the thirteen seats on

[4]The Appellants also suggest in their Jurisdictional Statement that a minority representation statute might violate the Constitution if it were designed to fence out racial minorities. We do not disagree. But there has never been any suggestion that the minority representation provision here either was racially motivated or has had a racial impact. Indeed, all but one of the persons elected to the D.C. City Council are members of a racial minority, and the one white member on the council is a Democrat.

the city council. Those provisions apply equally to every political party—a term which is defined in the D.C. Code to cover any organization which is capable of capturing more than a single seat on the council. *See* 1 D.C. Code 1121(j).

"Independent" is not a party or organizational label in the District of Columbia. Independent candidates in the District are independent both from the political parties and from each other. Each independent candidate stands for election individually and for a single seat only. Thus, as the District Court pointed out: the "danger [of an "organization" or "party" capturing all the council's seats] does not exist, by definition, with independent candidates, since they are not related organizationally to any other candidates running." (J.S. at 10 a.)

CONCLUSION

For the foregoing reasons, it is apparent that this appeal presents no substantial issue and this Court should, therefore, summarily affirm the decision below.

Respectfully submitted,

DAVID BONDERMAN
THOMAS B. WILNER
1229 - 19th Street, N.W.
Washington, D.C. 20036

DENNIS J. WHITTLESEY
815 Connecticut Ave., N.W.
Washington, D.C. 20006
Attorneys for Intervenor-Appellee Frank H. Rich

SAMUEL C. JACKSON
1100 Connecticut Ave., N.W.
Washington, D.C. 20036
Attorney for Intervenor-Appellee Jerry A. Moore, Jr.

AUSTIN P. FRUM
1220 - 19th Street, N.W.
Washington, D.C. 20036
Attorney for Intervenor-Appellee District of Columbia Republican Committee

Of Counsel:
ARNOLD & PORTER
Washington, D.C.

STROOCK & STROOCK & LAVAN
Washington, D.C.

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On Appeal from the United States District Court for the District of Columbia

APPELLANTS' REPLY TO INTERVENORS-APPELLEES' MOTION TO AFFIRM

Joseph H. Sharlitt
BECHHOEFER, SNAPP,
SHARLITT & LYMAN
Suite 300
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

Counsel for Appellants

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

IN THE

Supreme Court of the United States

SEPTEMBER TERM, 1975

No. 75-1532

JOHN HECHINGER, *et al.*, *Appellants*,
v.

DR. ROBERT MARTIN, CHAIRMAN,
DISTRICT OF COLUMBIA BOARD OF
ELECTIONS AND ETHICS, *et al.*, *Appellees*.

**On Appeal from the United States District Court
for the District of Columbia**

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Pursuant to this Court's Rule 16-4, Appellants deem it necessary to reply to one point raised in Intervenors-Appellees' Motion to Affirm. That point, raised in footnote 1 on page 2, raises the contention that this appeal "presents a challenge to the entire D.C. Self-Government Act."

In fact and law, this simply is not true. Literally, Appellants' difficulties are solely with the two voting sections of that Act, which sections are designated clearly in Appellants' Jurisdictional Statement. As to the contention that the absence of a severability clause somehow broadens

this narrow attack as a matter of law, the litany of apportionment cases already decided by this Court totally removes that spurious contention. For in each of these apportionment cases, clear legislative intent, reflected in a voting plan precisely desired by the legislature was before the Court. In no case did the presence or absence of a severability clause deter this Court from isolating those features of the voting plan that were constitutionally offensive and striking them down. Indeed, in the face of a plainly contrary intent from the state legislatures, the lower federal courts and this Court have developed interim voting plans of their own. and have, again, in contravention of legislative intent and in order to preserve constitutional rectitude, called mid-term elections. (*Reynolds v. Sims*, 377 U.S. 586 (1963)). *Mann v. Davis*, 238 F. Supp. 458 (E.D. Va. 1964, aff'd 379 U.S. 694 (1965)). In no case did this Court or any other Court stay its hand in moving to invalidate unconstitutional voting provisions because of the absence of a severability clause. What the lower court and this Court have done, with unavailing uniformity, is to strike down oppressive voting provisions, restricting their decrees to the unconstitutional provisions and leaving to the legislatures the subsequent chore of sorting out their intent in a constitutional manner. See *Whitcomb v. Chavis*, 403 U.S. 124 (1975) at 160-161.

That relief is precisely what is sought in this benchmark test of legislative power to dictate a wholly political result: representation not desired by voters in local elected bodies.

Respectfully submitted,

BECHHOEFER, SNAPP,
SHARLITT & LYMAN
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006
Suite 300

By _____
Joseph H. Sharlitt

_____
Bernhard G. Bechhoefer

_____
Joseph J. Lyman

_____
Neal E. Krucoff

Counsel for Appellants

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No. 75-1532

In the Supreme Court of the United States

OCTOBER TERM, 1976

JOHN HECHINGER, ET AL., APPELLANTS

v.

DR. ROBERT MARTIN, CHAIRMAN, DISTRICT OF COLUMBIA BOARD OF ELECTIONS AND ETHICS, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
Solicitor General,
J. STANLEY POTTINGER,
Assistant Attorney General,
FRANK H. EASTERBROOK,
Assistant to the Solicitor General,
BRIAN K. LANDSBERG,
WALTER W. BARNETT,
MARIE E. KLIMESZ,
Attorneys,
Department of Justice,
Washington, D.C. 20530.

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Council. This Council exercises the legislative power that Congress has granted to the District of Columbia.[1]

The Act provides that eight members of the Council are elected from wards and five members, including the Chairman, are elected at-large. Section 401 of the Act provides that no more than three of the at-large seats may be held by members of the same political party. No political party may nominate more of its members than would be eligible to hold office.[2] As a result of these limitations upon the at-large seats, no party may hold more than 11 of the 13 seats on the Council.

The term of office of the members of the Council is four years, but members elected in 1974 to the first Council serve staggered terms. Section 401(b)(3) provides that two of the four initial at-large Council members (other than the Chairman) were to serve for only two years; two at-large seats therefore were filled in the November 1976 election. Not more than one of the at-large members nominated by any political party in 1974 shall serve for the initial four year term (*ibid.*).

At the November 1974 election nominees of the Democratic Party prevailed in all eight ward elections. In the at-large elections the Democratic Party nominee was elected Chairman of the Council, and both Demo-

[1] Certain powers have been reserved by Congress. See Sections 601 and 604; D.C. Code (Supp. II) § 1–126 and §1–127.

[2] A person who runs in a party primary and who is not nominated by his party may not thereafter run in the general election as an independent candidate. Section 751(j)(a); D.C. Code (Supp. II) § 1–1108(j)(2).

cratic Party nominees were elected to other at-large seats. The two other seats were filled by nominees of the Republican Party and the Statehood Party. In the November 1976 election two at-large members were re-elected, one a Democratic Party nominee and the other the Republican Party nominee.

The upshot of the statute is that nominees of the Democratic Party, with which 76.55 percent of the District's registered voters are affiliated, hold 11 of 13 seats on the Council, or 84.6 percent (J.S. App. 3a). The Republican Party, with which 11.52 percent of the voters are affiliated (J.S. 7), holds 7.7 percent of the seats. The Statehood Party, with which 0.55 percent of the voters are affiliated (J.S. 7), holds 7.7 percent of the seats. And although 11.11 percent of the voters are independent or unaffiliated (J.S. 7), no unaffiliated candidate has been elected to the Council.

2. Appellants[3] sought a judgment declaring the pertinent portions of Section 401 of the Act to be unconstitutional and enjoining officials of the Board of Elections and Ethics from enforcing them (J.S. App. 1a–2a). A three-judge court was convened, and the Republican member of the Council, the local Republican Party organization of the District, and a registered independent voter who ran unsuccessfully as an independent candidate for a seat on the Council in the November 1974 election were allowed to intervene (*ibid.*).

[3] The District of Columbia's local Democratic Party organization (the Democratic Central Committee) and affiliated Democrats in the District of Columbia.

Appellants contended: (1) that the limitations on the number of seats that can be held by members of a single party unconstitutionally abridge their ability to vote for candidates who share their political beliefs and to associate with other Democrats in political activity; (2) that the Act violates the equal protection component of the Due Process Clause of the Fifth Amendment by treating independent voters and candidates differently from candidates of political parties; and (3) that the Act violates the "one-man, one-vote" principle of *Reynolds* v. *Sims,* 377 U.S. 533.

The three-judge court granted summary judgment for appellees (J.S. App. 1a–11a; 411 F. Supp. 650). Recognizing "the fundamental nature of the rights claimed by [appellants] under the First Amendment" (J.S. App. 4a), the court applied the test articulated by this Court in *Buckley* v. *Valeo,* 424 U.S. 1. It concluded that "Congress' interest in facilitating some representation of political minorities on the City Council of the nation's capitol" (J.S. App. 5a) is a sufficiently important interest to justify the Act, and that the minority representation device adopted by Congress does not unnecessarily abridge appellants' rights.

The court also held that the Act does not deny appellants equal protection by treating independent candidates differently. It concluded that such candidates are independent both from each other and from any organized group, so that they do not present any threat of monopolization of Council seats by a single

party (J.S. App. 9a–10a). This fully distinguishes independent candidates from party nominees, the court reasoned, and supports Congress' differentiation.[4]

DISCUSSION

1. Article I, Section 8, Clause 17 of the Constitution provides that Congress shall "exercise exclusive Legislation in all Cases whatsoever" over the District of Columbia. The Constitution thus does not guarantee residents of the District any participation in the making of laws for their governance (except for the right conferred by the Twenty-third Amendment to participate in the selection of Presidential electors). It is ironic that appellants now are arguing that the Constitution entitles them to greater representation in the District's governance than Congress has granted.

Before the enactment of the home rule legislation by Congress, the District had an appointive council of quite limited powers. Membership on the appointed council was limited by a provision (see Reorganization Plan No. 3 of 1967, 81 Stat. 948) that no more than six of the nine members of the Council could be affiliated with the same party. The legislative history of the home rule legislation does not indicate why Congress selected a plan of election that guaranteed bipartisan membership on the Council,

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[4] Although the court did not explicitly discuss appellants' one-man, one-vote argument, it relied on several cases rejecting such an argument in similar situations (J.S. App. 6a–9a).

but it is at least a fair inference that Congress desired to retain this feature of the former appointive system.[5] Because the District is the seat of the federal government, and because of the peculiar needs for cooperation among District officials, Congress, and the President in the governance of the District, it is singularly appropriate that the District's legislative body not be comprised of adherents to but a single political party.

The D.C. Home Rule Act provides District residents with some of the benefits of local representation

[5] The House committee had reported a bill requiring partisan elections (see H.R. Rep. No. 93–482, 93d Cong., 1st Sess. (1973)), but a strong minority report recommended entirely nonpartisan elections. These were appropriate, the minority argued, because many public employees in the District were barred by the Hatch Act, 5 U.S.C. 7324, from taking part in partisan politics. On the floor an amendment adopting the minority view passed. 119 Cong. Rec. 33670 (1973). The Conference Committee restored partisan elections, but added, for the first time, the provisions challenged in this case. H.R. Conf. Rep. No. 93–703, 93d Cong., 1st Sess. 13, 74–75 (1973). The Conference Committee did not articulate reasons for selecting this compromise, although it was regarded as important in light of the Senate's insistence upon partisan elections. See 119 Cong. Rec. 42036–42037 (remarks of Rep. Diggs); *id.* at 42451 (remarks of Sen. Eagleton). The only statements suggesting a basis for the particular compromise were made by witnesses in the House hearings who argued for a continuation of the bipartisan representation that had prevailed under the appointive system. See Hearings on D.C. Government Organization before the Subcommittee on Government Operations of the House Committee on the District of Columbia, 93d Cong., 1st Sess. (1973) Pt. 2, pp. 264–265, 268 (testimony of Gilbert Hahn, Jr., former Chairman of the City Council), Pt. 2, pp. 210, 213 (testimony of Melvin Burton, Co-chairman, Self-Government Committee of the Republican Central Committee).

without extending full home rule; the Act reserves some powers to Congress and allows Congress to disapprove other decisions of the local Council.[6] Congress also declined to allow all of the members of the Council to be affiliated with the same political party. That provision, like the provisions dealing with the scope of the Council's legislative powers, is a compromise. It does not allow majority rule in all respects, but to the extent that it does not it achieves other valued goals. In giving a voice to those who belong to minority parties or are independent of any party, Congress has apparently sought to avoid neglect of their legitimate interests[7] and to facilitate a harmonious working relationship among the Council, Congress and the Presidency. We submit that the plan Congress devised is no more open to attack because of its reasonable limitation on the ability of the majority party to capture all of the seats than it is open to attack because of its limitations on the scope of the Council's legislative powers or the fact that Congress can set aside its decisions.

2. This case is controlled by *Blaikie* v. *Power,* 13 N.Y. 2d 134, appeal dismissed for want of a substantial federal question, 375 U.S. 439. The statute at issue in *Blaikie* allowed each party to nominate only a single

[6] See Sections 601 and 604; D.C. Code (Supp. II) § 1–126 and § 1–127.

[7] The power of the majority party when it commands the adherence of most of the voters is well understood. *Nixon* v. *Herndon*, 273 U.S. 536; *Nixon* v. *Condon*, 286 U.S. 73; *Smith* v. *Allwright*, 321 U.S. 649.

candidate for office in a race in which two persons would be elected; moreover, each voter could vote for only one of the candidates. The jurisdictional statement (No. 617, October Term, 1963) argued that this scheme deprived parties of their right to nominate candidates for each office and deprived voters of their right to cast votes for each office. The Court rejected those arguments by dismissing the appeal for want of a substantial federal question.[8] If the statute at issue in *Blaikie,* which involved limitations on both nominations and voting, was constitutional, the constitutionality of the D.C. Home Rule Act, which involves only limitations on nominations, follows *a fortiori.*

The constitutionality of the Act also is demonstrated by *Gaffney* v. *Cummings,* 412 U.S. 735, which upheld a reapportionment statute designed to give political parties representation roughly proportional to their support among the voters. The Court indicated that a plan of this sort would be vulnerable only (*id.* at 754)—

> if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized. * * * Beyond this, we have not ventured far * * *. Even more plainly, judicial interest should be at its lowest ebb when a State purports fairly to allocate political power to the parties in accordance with their voting strength and, within quite tolerable limits, succeeds in doing so.

[8] See also *LoFrisco* v. *Schaffer,* 341 F. Supp. 743 (D. Conn.), affirmed, 409 U.S. 972, which also involved a limited voting plan.

Although *Gaffney* did not involve a First Amendment challenge, similar considerations were involved in the Court's rejection of the equal protection claims in that case. The decision therefore lends strong support to the D.C. Home Rule Act, which, like the statute in *Gaffney,* attempts, not to distort the electorate's representation on the Council, but "fairly to allocate political power to the parties in accordance with their voting strength."

3. The congressional design is a compromise. In assuring some minority representation, it limits the free choice of a majority of the voters in electing all of the members of the Council. But several lines of cases suggest that, far from being constitutionally suspect, this is a permissible method of legislative representation. A plan such as the one Congress has selected does not allow the majority party to achieve all of its aims, but the alternative was to allow a system under which a party with approximately three quarters of the registered voters could capture all of the seats on the Council. Neither outcome is ideal,[9] and neither of them is constitutionally precluded.

This Court has recognized that compromise and experimentation are permissible, perhaps even essential, ingredients in devising systems of representation. "Viable local governments may need many innova-

[9] Indeed, political scientists generally have recognized that no system of representation can perfectly translate the people's preferences into law. See Niemi and Riker, *The Choice of Voting Systems,* 234 Scientific American 21 (June 1976); Arrow, *Social Choice and Individual Values* (2d ed. 1963).

tions, numerous combinations of old and new devices, great flexibility in municipal arrangements to meet changing urban conditions" (*Sailors* v. *Board of Education,* 387 U.S. 105, 110–111). The Court upheld in *Sailors* a system under which members of the Board of Education were appointed rather than elected, despite the argument that this diminished the power of the electoral majority.

Other cases, such as *Lucas* v. *Forty-Fourth General Assembly of Colorado,* 377 U.S. 713, have held that the majority cannot, even voluntarily, divest itself of power. But in *Lucas* the majority had surrendered to minority rule; that is hardly so in the District of Columbia, where the majority party holds 11 of 13 seats—a greater than proportional representation. Other voting cases, whether cast in First or Fourteenth Amendment terms, have invalidated systems that diminished the power, or curtailed the expression, of identifiable and stable groups. But statutes that do not draw inflexible geographic or ideological lines, and are not directed against any racial, religious, or other ethnic group, do not share this vice of systematic discrimination. Today's political majority may be tomorrow's minority. Under the D.C. Home Rule Act the rights of each individual are the same, and his opportunities quite properly depend upon whether his preferences are favored by a majority or a minority.

Because the statute involved here treats all voters and candidates equally in principle, "discriminating"

only by the fortuity that some are in a fluctuating majority, the present case is analogous to *Gordon* v. *Lance,* 403 U.S. 1, which approved a state statute under which a municipality could not increase its bonded indebtedness without the approval of three-fifths of the voters. The Court recognized that this gave a disproportionate weight to the votes of those in the minority, but it concluded that "there is nothing in the language of the Constitution, our history, or our cases that requires that a majority always prevail on every issue" (403 U.S. at 6). The absence of systematic discrimination saved the statute.

A system of proportional representation, under which all candidates stood for election at large and the seats were allocated in proportion to the vote each party received, surely would be constitutional; each party would achieve representation in accordance with its strength. Appellants do not contend otherwise. But completely proportional representation and completely at-large elections would deprive the District of some of the benefits of elections from single-member wards.[10] Elections from such wards afford opportunities for representation of the different interests of different parts of the District. Conversely, a system under which there were no at-large seats would deprive the Council of members oriented towards an overview of the District's problems. The Act's compromise—eight mem-

[10] Proportional representation and elections from single-member districts are incompatible because only one candidate can prevail in each district, and the minority will necessarily be left unrepresented.

bers of the Council elected from wards, five elected at large—ensures representation of parochial views as well as broader perspectives, but at the same time creates the possibility that some minority points of view would be entirely overlooked.

This is a concern the Court has recognized many times. In reapportionment cases it has instructed federal courts not to adopt at-large or multi-member district representation plans because of the danger of leaving minority groups or perspectives unrepresented or under-represented. See, *e.g., East Carroll Parish School Board* v. *Marshall,* 424 U.S. 636; *Chapman* v. *Meier,* 420 U.S. 1, 17–19; *Mahan* v. *Howell,* 410 U.S. 315, 333. The same principle applies in cases under the Voting Rights Act. See, *e.g., City of Richmond* v. *United States,* 422 U.S. 358, 368–371; *City of Petersburg* v. *United States,* 354 F. Supp. 1021 (D. D.C.), affirmed, 410 U.S. 962. In the D. C. Home Rule Act, Congress provided for a careful mix of single-member ward and at-large elections. It could not realistically anticipate, however, that minority political representation would be afforded on the District's Council by the ward representation component. Accordingly, it provided for a guaranty of such minority representation in a portion of the at-large component, to offset an otherwise inherent disadvantage of at-large elections. We submit that the Act is consistent with the Constitution; the majority has no constitutional right to reap overrepresentation at the expense of the minority, and Congress should not be

consigned to ward elections or proportional representation as the only permissible devices for attempting to counteract the disadvantages of at-large elections.

This conclusion also is supported by *Dallas County* v. *Reese,* 421 U.S. 477, *Fortson* v. *Dorsey,* 379 U.S. 433, and *Dusch* v. *Davis,* 387 U.S. 112. Those cases involved at-large elections in which there was a geographic restriction upon the residence of the candidates. The Court upheld the restrictions against arguments that they diluted the votes of those living in the more populous portions of the district and that they restricted the rights of voters to select whom they pleased. Although the Court recognized that the "rural" representatives might outvote the "urban" representatives, it declined to characterize the system of representation as one bound to geographic interests; it held, instead, that the representative is presumed to represent those who elect him, not merely those who live near him or offer him as a candidate. And so it is here. Although no party can nominate more than three of the five at-large members of the Council, all five of them are elected by vote of the entire electorate. Thus no voter is disfranchised or, within this limitation on candidate qualification, prevented from expressing his views. The members of the Council, although nominated by diverse parties (or independent of any party), will represent those who elect them. Insofar as members of the Democratic Party cast ballots that determine which of the Re-

publican or Statehood Party nominees, or which independent candidates, will fill the two seats for which the Democratic Party cannot make nominations, they cast ballots fully as effective as those cast by any other voter.[11]

4. We therefore conclude that the D.C. Home Rule Act is consistent with the Constitution. The judgment of the district court should be affirmed. There is no need for plenary consideration, because each of the strands of voting rights law, and particularly the Court's summary disposition of *Blaikie,* supports the permissibility of Congress' choice. Moreover, the D.C. Home Rule Act stands on a special footing because of the plenary power of Congress over the District's affairs and the fact that Congress has retained the ultimate legislative power over the District. Thus, a decision of this Court after plenary review would not necessarily settle the constitutionality of any statutes similar in effect to the D.C. Home Rule Act enacted by States or municipalities.

[11] Although we have not separately discussed appellants' argument that the Act violates the equal protection component of the Due Process Clause by treating independent candidates differently from the nominees of any party, we think it without substance for the reasons stated by the district court (J.S. App. 9a–10a). Cf. *Buckley* v. *Valeo*, *supra*, 424 U.S. at 68–74, 97–106. There is no claim of systematic discrimination against independent candidates or small parties, and there is thus no reason to hold this case pending the disposition of *Mandel* v. *Bradley*, No. 76–128, probable jurisdiction noted, October 4, 1976. Nor are appellants correct in arguing (J.S. 19–20) that approval of the Act here would imply approval of racial quotas and the like. The D.C. Home Rule Act is neutral on its face, employing no invidious criteria of any kind.

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.
J. STANLEY POTTINGER,
Assistant Attorney General.
FRANK H. EASTERBROOK,
Assistant to the Solicitor General.
BRIAN K. LANDSBERG,
WALTER W. BARNETT,
MARIE E. KLIMESZ,
Attorneys.

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Joseph H. Sharlitt
BECHHOEFER, SHARLITT
& LYMAN
Suite 300
1747 Pennsylvania Avenue, N.W.
Washington, D.C. 20006

Counsel for Appellants

THE CASILLAS PRESS, INC.–1717 K Street, N. W.–Washington, D. C.–223-1220

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I: INTRODUCTION

(A)

This case tests for the first time the constitutionality[1] of an attempt by Congress (or any legislature) to impose the political makeup of a local council or legislative body on the voters who elect it, regardless of the political preferences of those voters.

[1] Against First and Fifth amendment standards, never before applied to this rare phenomenon in the law, voter-restriction statutes, see infra. p. 5-8.

On June 14, 1976[1a] this Court invited the Solicitor General of the United States to file a brief outlining the views of the Government on the issues in this cause. On November 24, 1976 the brief of the Solicitor General was filed. This Response of Appellants replies to the submission of the Solicitor General.

(B)

The specific issues in this cause, as raised by Appellants' Jurisdictional Statement are three: First, whether the statutory prohibition against Democrats (or members of any other political party) filling more than 50% of the at large seats[2] in the District of Columbia Council violates the First Amendment rights of Democratic voters to select Democrats as their representatives in this legislature; Second, whether the statutory exemption of independent candidates (who may fill all of the at large seats) from this same restriction, imposes an unconstitutional discrimination against partisan voters and party candidates; Third, whether the "one-man, one vote" principles of *Reynolds v. Sims*, 377 U.S. 533 is violated by this voter-restriction statute, under which the District's 76.55% Democrats are limited to 50% of the at large seats,[3] regardless of the makeup of the remainder of the Council.[4]

[1a] The procedural steps below were set forth in Appellants' Jurisdictional Statement filed April 23, 1976. Motions to dismiss or affirm were filed by the Defendants below on May 20 and 24, 1976. Appellants replied on June 8, 1976. As noted in the text, This Court then, on June 14, requested a Brief from the Solicitor General.

[2] Section 401(b)(3) of the Home Rule Bill restricted any political party to no more than 2 of the 4 at large seats on the Council in the original election in 1974. Since the Chairman of the Council is also elected at large, Section 401(d)(3) restricts that no more than 3 of the 5 representatives elected at large shall be from one party. In each election no more than 50% of the at large seats to be filled in that election may be filled by one party. This Brief refers to the 50% limitation found in Section 401(b)(3) because it is the one that faces voters in each election. Each argument, obviously, also goes equally to 401 (d)(3) where the restriction on any party is to fill no more than 60% of the at large elected posts in the Council, including the Chairman.

In their Jurisdictional Statement Appellants warned the Court that this statute poses a benchmark examination of legislative intrusion into a hitherto forbidden area: dictation by legislative fiat the political makeup of elected local legislative bodies. In the Jurisdictional Statement Appellants also pointed out the constitutional novelty of dictating to voters whom they may vote for to represent them, and whom they may not, doing so entirely on the basis of a flat statutory prohibition against voting for candidates of specified political beliefs. In consequence, Appellants pointed out, that this Court, in the strange new world of voter-restriction statutes, would be inevitably propelled into a maelstrom of political decisions, none of which are in this Court's proper domain, but all of which would become this Court's business.[5]

All of these considerations were ignored by the Solicitor General. Rather, his brief chose to contend that (1) the

[3] In each election such as the one that occurred on November 2nd, 1976, under the provisions of 401(b)(3).

[4] The prohibition against Democrats (or members of any other party) from filling more than two of the four at large seats applies even if the eight ward seats happen to be evenly split between the parties. At that point this supposed protection for minority parties would become a veto against assumption of majority control and purpose by *any* party.

[5] Appellants' Jurisdictional Statement, 18-26.

unique (in his view) constitutional status of the District of Columbia permits this form of experimentation by Congress with the voting rights of District residents,[5a] (2) the outcome herein is "controlled" by prior case law,[5b] and (3) various other forms of statutory voting rules provide a constitutional basis for Congress' dictation of representation to District voters, regardless of what these voters desire.[5c] This submission will go to each contention, seriatim.

II: DISCUSSION

(A)

In a series of striking statements, the Solicitor General demonstrates his belief that residents of the District of Columbia hold second class constitutional rights to political expression and choice. Witness, if the Court will:

> "Because the District is the seat of the federal government, and because of the peculiar needs for cooperation among District officials, Congress, and the President in the governance of the District, it is singularly appropriate that the District's legislative body not be comprised of adherents to but a single political party."
> (Br. Sol. Gen., 6)

Thus, if one is to accept this view, political expression by residents of the District of Columbia is subjected to "appropriate" restrictions not shared with voters anywhere else. Further:

> "We submit that the plan Congress devised is no more open to attack because of its reasonable limi-

5a Br. Sol. Gen., 5-7.

5b Ibid, 7-9.

5c Ibid, 9-14.

> tation on the ability of the majority party to capture all of the seats than it is open to attack because of its limitations on the scope of the Council's legislative powers or the fact that Congress can set aside its decision." (Br. Sol. Gen., 7)

Thus, if one is to believe the Solicitor General, Congress' restrictions on the legislative powers of the D.C. Council are, in some way, equated with Congress' right to restrict the political belief and party of persons who represent District voters in their legislature – whatever its powers.[6]

These views are constitutional aberrations repugnant to basic notions of voting fairness. They are equally repugnant to all citizens – of whatever political stamp – of the District of Columbia. Appellants urge that once Congress enacted into law political, partisan elections to the legislature of the District of Columbia such political, partisan elections are subject to the same constitutional safeguards that govern political elections anywhere in this country. Congress cannot constitutionally enact political elections for District residents and then impose unconstitutional restrictions on such elections. It could not, for instance, provide for political elections to the District legislature and then decree that only Democrats, or only whites, or only property-owners could sit in this legislature. Nor can Congress provide political elections for the District of Columbia legislature and then, for whatever reason, decree in its benign wisdom the political makeup of that legislature.

6 "Moreover the D.C. Home Rule Act stands on a special footing because of the plenary power of Congress over the District's affairs and the fact that Congress has retained the ultimate legislative power over the District" (Br. Sol. Gen., 14); that plenary power, Appellants submit, does not supersede the First and Fifth Amendments which remain in force for all District of Columbia residents.

That is precisely what has been done here in a wholly unique statute of a kind that his Court has never before scrutinized for First and Fifth Amendment violations. These violations are improperly laundered in the wash of the new provincialism accorded the constitutional rights of District residents, when the Solicitor General concludes:

> "We submit that the Act is consistent with the Constitution; the majority has no constitutional right to reap over-representation at the expense of the minority, and Congress should not be consigned to ward elections or proportional representation as the only permissible devices for attempting to counteract the disadvantages of at large elections." (Br. Sol. Gen., 12)

Putting aside a highly legitimate inquiry into what the precise mechanics of "over-representation" of the majority in the routine activities of a freely-elected local legislature might be,[7] the essential question in this case is not the rights of the majority *qua* majority. The heart question is the right of the individual voter to vote his political belief in a partisan election for representatives to his own legislature. And a statute denying that right in the way that this statue does has never been before this Court for review. The fact that this denial forms a part of the Home Rule law for the District of Columbia does not transform this denial of political rights protected under the First Amendment into anything else. That is, of course, unless

[7] The Solicitor General notes that Democrats now hold 84.6% of the seats in the District of Columbia Council (Br. Sol. Gen., 3). But he also admits that "Today's political majority may be tomorrow's minority" (Br. Sol. Gen., 10). What will remain unchanged, however, is the restrictions found in this statute, no matter what the future outcome of the eight ward rules might be.

the First Amendment has been repealed for residents of the District of Columbia.

(B)

The Solicitor General states that this case is controlled by *Blaikie v. Power*, 13, N.Y. 2d 134, 375 U.S. 439.[8] If the statute in Blaikie were the same as the one before the Court now (which it is not),[9] if the First and Fifth Amendment arguments in this case had been made to the Court below in *Blaikie* (which they were not),[10] and if these same arguments had been placed before this Court on Appeal[11] (which

[8] Br. Sol. Gen., 7.

[9] Unlike the present case, independent candidates were restricted in *Blaikie*, Section 1200, 22 C, New York City Charter.

[10] Judge Fuld's opinion below in *Blaikie* concerned itself with whether the contested provision of the New York City Charter violated a specific provision of the *New York State* constitution. There is no discussion of First Amendment issues (very different from those raised under the New York provision) whatever, nor was the issue of discrimination against partisan belief or party candidates present in *Blaikie*.

[11] In the Briefs to this Court Blaikie raised "due process" and "equal protection" arguments based on "an unreasonable discriminatory provision denying New York City voters the right to vote for all elected officials in contrast to voters elsewhere in New York. Although the inhibition against party candidates running for all open seats is, in fact, noted in his Brief, Blaikie nowhere developed this argument, it is not touched in Judge Fuld's opinion nor in the response in this Court of the City of New York. One may fairly say that the First Amendment problems raised in *Hechinger* were not examined in *Blaikie*, and Fifth Amendment discrimination against parties on belief and party candidates simply was not an issue under the New York City Charter provision there under dispute.

they were not), the Solicitor General would be right. But he is not. The issues and result in both *Blaikie* and *Lo Frisco v. Schaffer*, 341 F. Supp. 743 (D.C. Coun.), 409 U.S. 972 were discussed in the Jurisdictional Statement (p. 16-17). It was therein stated that if this Court wishes to embark on the treacherous waters of adjudicating voter-restriction statutes for reasonableness (or on any other yardstick against which constitutional deprivation can be weighed) nothing in either *Blaikie* or any other case provides precedent. This case, *Hechinger*, will be the license for legislatures to impose voting restrictions on local electorates because it is in *Hechinger* that the constitutional questions raised by such statutes are first raised. No fair reading of any other case, be it *Blaikie* or *Lo Frisco*, neither below, certainly not in the briefs to this Court, nor in the one sentence opinions here, justifies this court's taking on a far-reaching political function for which it is not suited – without briefing and careful questioning as to whether it is constitutionally proper for it to do so. And such briefing and questioning would also go to the Pandora's Box of related problems let loose on future legislatures and courts, discussed in detail in the Jurisdictional Statement,[12] but quite ignored by the Solicitor General.

As to the other cases cited in the Solicitor General's second argument[12aa] it is appropriate to note that in none of them was a single voter denied the right to vote for any elected official, at any level, local, state or national. *Gaf-*

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12 That only two of the 12 Council seats are fenced off from the free exercise of the political franchise simply means that this statute is only slightly impregnated with unconstitutionality.

12aa Br. Sol. Gen., 7-9.

fney[12a] and its progeny are all apportionment cases in which the issue was whether individual votes counted equally, or reasonably equally, in the election of state officials. And as pointed out in the Jurisdictional Statement (Juris. St. 17) the language of *Gaffney* itself makes it very clear that when:

> "political groups have been fenced out of the political process and their voting strength invidiously minimized"[12b]

voting plans run afoul of the Constitution. The Democratic Party of the District of Columbia could not be more effectively fenced out of access to 50% of the at large seats in the Council[13] than it has been under this statute. And that remains true no matter what the makeup of the remainder of the Council might be.

There is no judicial precedent for Congress' dictate to the voters of the District that they cannot vote their political beliefs for 50% of the at large representatives on their own Council. There is no judicial precedent for Congress' exemption of independent candidates from this restriction. This statute is unique in the annals of the law. Review of it by this Court is a first.

12a *Gaffney v. Cummings*, 412 U.S. 735, (cited at Br. Sol. Gen., 8, 9); this same distinction applies with equal force to cases supposedly supporting the Solicitor General's third argument (infra, 8-10).

12b 412 U.S. at 754.

13 The statute herein achieves precisely the reverse of the statute in *Gaffney;* rather than "fairly to allocate political power to the parties in accordance with their voting strength" (Gaffney, 412 U.S. at 254) the District statute allocates the at large seats in the Council as Congress, not the voters, deems desirable.

(C)

The third argument of the Solicitor General seems to be this: Congress has a legitimate concern in the expresssion of minority views in the District of Columbia Council and the constitution permits sufficient flexibility in voting regulations to permit this statute's mode of satisfying that concern.[14]

No one disputes that expression of minority views in *any* legislature is a desirable social goal, whether in the states or here in Washington. But it is a vast constitutional leap from desirable social goals to legitimate areas for legislation. The proof of that truism lies in the cases offered by the Solicitor General in support of the constitutionality of this attempt to legislate public virtue. They all are apportionment cases (or cases related thereto) which do not touch the problem in *Hechinger*. None of them approaches approval by this Court – or any Court – of a statute dictating the politics of elected local legislators.[15] In *Sailors v. Board of Education*[16] and *Gordon v. Lance*,[17] no one was denied a vote for anything. *Sailors* held that Michigan's county boards of educa-

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14 Br. Sol. Gen. 9-14.

15 There are other ways for Congress to insure a broad spectrum of expression in the District of Columbia Council without running afoul of the Constitution. Appellants do not here dispute the constitutionality of non-partisan elections. Nor do they contest the propriety of true proportional representation, where every voter may vote his political preferences. The statute in this case, however, is neither. It is a misplaced attempt to transplant fixed political make-up from appointive bodies (such as the federal executive agencies) to elected legislative bodies.

16 387 U.S. 105 cited at Br. Sol. Gen., 10.

17 403 U.S. 1 Ibid, 11.

tion, *non-legislative* bodies, could constitutionally be appointed, not elected. *Gordon* ruled that West Virginia's 60% voting requirement for the approval of bond issues did not violate the one-man, one-vote rubric. *East Carroll v. Marshall*,[18] *Chapman v. Meier*[19] and *Mahan v. Howell*[20] were, again, strict apportionment cases, testing whether the mathematical departure in each from absolute voter equality was constitutional. None of them dealt with statutes that dictate the political makeup of any part of a legislature; in none of them was a single voter denied the right to vote his politics for any elective office.

Finally, the Solicitor General's comment on *Dallas County v. Reese*,[21] *Fortson v. Dorsey*[22] and *Dusch v. Davis*[23] is ample proof that flexible apportionment falls worlds short of political dictation to voters. Those cases involved statutes imposing residence requirements on candidates, a restriction as old as voting itself. The issue in each was whether reasonable equality of individual votes was affected by these Republican, or a Prohibitionist, or holder of any other political belief. None of this Court's decisions in multiple-member (or at large) voting cases involved the specific, direct denial of political preference found in *Hechinger*.

When the Solicitor General states in his subsequent comments on these cases that under this statute now in controversy here in the District of Columbia:

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18 424 U.S. 636, Ibid, 12.

19 420 U.S. 1, Ibid, 12.

20 410 U.S. 315, Ibid, 12.

21 421 U.S. 477, Ibid, 13.

22 379 U.S. 433, Ibid, 13.

23 387 U.S. 112, Ibid, 12.

"no voter is disfranchised" (Br. Sol. Gen. 13)

this simply is not so. The undersigned and 208,000 other Democrats in this city were forced by law to vote for a Republican or a Statehood supporter on November 2nd last. That is what disenfranchisement is all about. If it is not, then the millions who regularly vote 99% majorities in support of a chosen Government slate in East European elections are similarly not "disfranchised." But both there and here the voters' political preference is denied them.

Immediately thereafter the Solicitor General adds that no voter is:

> "within this limitation: (the statute)
> "prevented from expressing his views"
> (Br. Sol. Gen. 13)

That statement is just as wrong. Those same Democrats had their political views absolutely, totally stifled in the election of 50% of the at large Councilmen on November 2nd, and will have those views stifled in every future election.

It is a total distortion, indeed a reverse twisting, of reapportionment cases to contend that any of them stands as precedent supporting the statute herein. Every apportionment case that reached this Court and every decision of the Court in these cases sought to establish a rough, reasonable equality for all votes to elected office, local, state or national. Now a statute intervenes to prohibit members of a political party from voting their politics in a political election for seats in an elected, legislative body. That is one-man, *no*-vote for members of that party. And that disenfranchised party, which today in the District of Columbia is the Democratic Party, may tomorrow be any Party.

(D)

Appellants point out to the Court that on October 4, 1976 it noted probable jurisdiction in *Mandel v. Bradley* (No. 76-1287). Bradley's issues and those in Hechinger are parallel: Bradley, an independent candidate, contends he was denied First and Fourteenth Amendment rights by being forced to file his petitions earlier than were party candidates. This is the obverse side of the discriminatory exemption (against Party voters and candidates) given independent candidates and voters under the District of Columbia statute. Further, both *Bradley* and *Hechinger* raise similar questions regarding the precise meaning of prior summary decisions by this Court. It is respectfully submitted that concurrent briefing and argument in both *Bradley* and *Hechinger* would provide the Court a useful opportunity to set forth in detail the constitutional guidelines in this hitherto uncharted area of voter restrictions.

III: CONCLUSION

The brief of the Solicitor General offers little help to the Court in considering this troublesome new voter restriction. What has been done in the Solicitor General's brief is an attempt to allay the Court of anxieties regarding the Court's own function, if it chooses to summarily affirm the Court below. But the problems will remain. If this statute stands, the Court moves squarely into the business of determining on a case-by-case basis what is reasonable representation for minority parties who cannot secure this representation at the polls. If this statute stands, the Court will have approved for the first time a dictate by Congress and by any state legislature to the individual voter, telling him how he can vote in a political election for his local legislature, and how he cannot. If this statute stands, the Court will have

taken on the mantle of superior wisdom, as did the Congress, wisdom superior to the expressed political beliefs of the voters as to who will best represent thm. This is an awesome departure for this Court. It arises, inevitably, from an unprecedented legislative intrusion into the purely political decisions made throughout our history (until now) within the conscience of individual voters.

Neither the locale of this departure, the District of Columbia, nor any prior decisions of this Court justify this departure.

Appellants therefore urge the Court to note probable jurisdiction in this cause, set it down for briefing and argument and thereupon to declare Sections 401 (b)(3) and 401 (d)(3) of the District of Columbia Home Rule Act unconstitutional as repellant to both the First and Fifth Amendments to the Federal Constitution.

Respectfully submitted,

BECHHOEFER, SHARLITT & LYMAN
1747 Pennsylvania Ave., N.W.
Washington, D.C. 20006

By _____
Joseph H. Sharlitt

_____
Bernhard G. Bechhoefer

_____
Joseph J. Lyman

Counsel for Appellants

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